

12:24:17 1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF TEXAS  
2 MARSHALL DIVISION

3 UNITED SERVICES AUTOMOBILE ) (  
ASSOCIATION ) ( CIVIL ACTION NO.  
4 VS. ) ( 2:18-CV-366-JRG  
6 ) ( MARSHALL, TEXAS  
7 WELLS FARGO BANK, N.A. ) ( JANUARY 9, 2020  
WELLS FARGO BANK, N.A. ) ( 12:34 P.M.

8

9 TRANSCRIPT OF JURY TRIAL

10 AFTERNOON SESSION

11 BEFORE THE HONORABLE CHIEF JUDGE RODNEY GILSTRAP,  
12 UNITED STATES DISTRICT JUDGE

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14

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34  
35 (Proceedings recorded by mechanical stenography, transcript  
36 produced on a CAT system.)

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1 P R O C E E D I N G S  
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12:34:51 5

12:34:51 6 (Jury out.)

12:34:51 7 COURT SECURITY OFFICER: All rise.

12:37:56 8 THE COURT: Be seated, please.

12:37:57 9 Dr. Villasenor, you may return to the witness

12:38:04 10 stand.

12:38:04 11 I remind you, you remain under oath.

12:38:10 12 MR. HILL: Your Honor, may I broach one quick

12:38:13 13 housekeeping matter before we get started with the jury

12:38:15 14 again?

12:38:16 15 THE COURT: You may, let's make it quick, though.

12:38:16 16 MR. HILL: Very quick. I just wanted to alert the  
12:38:20 17 Court we've got an offer of proof we've been preparing that  
12:38:22 18 we would need to file for purposes of our record. We were  
12:38:25 19 going to file it in writing.

12:38:27 20 I'm always hesitant to do that though without  
12:38:27 21 telling the Court first, so you don't just see something  
12:38:27 22 show up on your docket without thinking we raised it with  
12:38:30 23 you first.

12:38:30 24 It covers things related to the motion in limine  
12:38:33 25 process on exclusion, as well as a number of the things

12:38:37 1 we've talked about in chambers throughout the case. We  
12:38:39 2 just collected all those to do it at once.

12:38:42 3 I feel like we need to do that before our evidence  
12:38:44 4 closes, or at minimum, alert the Court that we would be  
12:38:49 5 doing it in writing and get your permission to do it that  
12:38:53 6 way.

12:38:53 7 I'm happy to follow the Court's pleasure in that  
12:38:53 8 regard, but I didn't want to let our case pass where we  
12:38:57 9 stood past our case without at least alerting the Court.

12:39:00 10 THE COURT: Is this offer of proof -- has it been  
12:39:02 11 reduced to writing at this point?

12:39:04 12 MR. HILL: Yes, Your Honor, it has.

12:39:06 13 THE COURT: All right. Is there some reason  
12:39:08 14 you're waiting to file it at this point?

12:39:10 15 MR. HILL: No, sir, just this -- we've just gotten  
12:39:12 16 it ready. Like I say, we were doing one cumulative, as  
12:39:17 17 opposed to piecemeal.

12:39:18 18 THE COURT: Why don't you file it on the docket.  
12:39:20 19 That will be done before you rest your case, and it will  
12:39:25 20 automatically be served on Plaintiff.

12:39:27 21 MR. HILL: Yes, Your Honor, will do. Thank you.

12:39:28 22 THE COURT: All right. Anything else before we  
12:39:29 23 bring the jury in and continue with Dr. Villasenor?

12:39:29 24 MR. SHEASBY: Nothing for Plaintiffs, Your Honor.

12:39:31 25 MR. MELSHEIMER: No, Your Honor.

12:39:32 1 THE COURT: All right. You may return to the  
12:39:34 2 podium, Mr. Melsheimer.

12:39:35 3 MR. MELSHEIMER: Thank you.

12:39:57 4 THE COURT: Let's bring in the jury, Mr. Johnston.

12:40:00 5 COURT SECURITY OFFICER: All rise.

12:40:02 6 (Jury in.)

12:40:05 7 THE COURT: Please be seated.

12:40:13 8 All right. Ladies and gentlemen, we'll continue  
12:40:14 9 with the direct examination of Dr. John Villasenor by the  
12:40:19 10 Defendant.

12:40:19 11 Mr. Melsheimer, you may proceed.

12:40:20 12 MR. MELSHEIMER: May it please the Court.

12:40:20 13 JOHN VILLASENOR, PH.D., DEFENDANT'S WITNESS,

12:40:20 14 PREVIOUSLY SWORN

12:40:20 15 DIRECT EXAMINATION CONTINUED

12:40:22 16 BY MR. MELSHEIMER:

12:40:22 17 Q. Good afternoon, Dr. Villasenor.

12:40:24 18 A. Good afternoon.

12:40:25 19 Q. All right. I want to return to where we were talking  
12:40:27 20 about when we broke. Do you have Paragraph -- do you have  
12:40:30 21 your report in your binder there?

12:40:31 22 A. Yes, sir, I do.

12:40:32 23 Q. Can you turn to Page 161?

12:40:34 24 A. I'm sorry, do you mean Paragraph 161?

12:40:41 25 Q. I meant Paragraph 161. I did, sir, thank you.

12:40:45 1 A. Yes, sir, I'm there.

12:40:53 2 MR. MELSHEIMER: May I get the ELMO?

12:40:57 3 Q. (By Mr. Melsheimer) Now, is this the version of the

12:40:59 4 slide we were looking at in your direct examination, sir?

12:41:02 5 A. Yes, sir, it appears to be.

12:41:04 6 Q. And does Paragraph 161, does that lay out your

12:41:08 7 understanding and your analysis of this divided

12:41:11 8 infringement issue?

12:41:13 9 A. Yes, sir, it does.

12:41:14 10 Q. And is that the testimony that you intend and want to

12:41:17 11 provide to the ladies and gentleman of the jury?

12:41:20 12 A. If I'm asked to, I'm happy to provide that.

12:41:23 13 Q. And you understand you write these things down in your

12:41:27 14 report, and you're both limited by that but you're also --

12:41:29 15 you can be refreshed by what you said before, right?

12:41:32 16 A. My understanding is that's right.

12:41:34 17 Q. Okay. So with respect to this first notion of

12:41:38 18 infringement standard for system claims involving multiple

12:41:42 19 entities, that's where we are, right?

12:41:43 20 A. Yes, sir.

12:41:44 21 Q. Okay. With respect to making the accused products, you

12:41:48 22 said in Paragraph 161 that Dr. Conte did not analyze any of

12:41:54 23 this in connection with his report or testimony; is that

12:41:58 24 right?

12:41:58 25 A. That's paraphrasing. I said he failed to prove any

12:42:02 1 claim of direct infringement, that's right.

12:42:03 2 Q. Right. So with respect to making the accused system,

12:42:08 3 is it your conclusion that Dr. Conte does not satisfy this

12:42:13 4 analysis because Wells Fargo does not combine all of the

12:42:18 5 claim elements because the users, not Wells Fargo, provides

12:42:23 6 the smartphone used in the accused device?

12:42:24 7 A. With respect to the making part of this test, that's

12:42:28 8 correct.

12:42:28 9 Q. And is that the words you used in your report,

12:42:31 10 "provide"?

12:42:33 11 A. I --

12:42:33 12 Q. Provide the smartphone?

12:42:35 13 A. Among other things, that right, yes.

12:42:37 14 Q. Okay. Now, with respect to -- so you didn't see any

12:42:44 15 analysis under this making step; is that right?

12:42:46 16 A. That's correct.

12:42:46 17 Q. So we can cross that off?

12:42:49 18 A. Yes, sir.

12:42:49 19 Q. All right. What about selling or offering to sell?

12:42:53 20 A. I opine -- I write that Dr. Conte does not allege that

12:43:01 21 Wells Fargo sells or offers to sells -- sell on a user's

12:43:05 22 smartphone's device processor.

12:43:06 23 Q. Which are instead sold or imported by third parties?

12:43:10 24 A. Correct, yes.

12:43:11 25 Q. Okay. So that would cover both sells and imports?

12:43:19 1 A. Yes, sir.

12:43:19 2 Q. And by crossing these out, am I reflecting your  
12:43:23 3 opinion, sir, that these are not satisfied by Dr. Conte's  
12:43:28 4 analysis?

12:43:28 5 A. Yes, sir.

12:43:29 6 Q. And, finally, let's go to the final one with is --  
12:43:33 7 which is users. What's your understanding, looking at  
12:43:36 8 Paragraph 162, the sentence beginning with "with respect to  
12:43:43 9 use," what's your understanding of what Dr. Conte failed to  
12:43:46 10 do in his report?

12:43:46 11 A. My understanding is that Dr. Conte would have been  
12:43:50 12 required to show that Wells Fargo, among other things,  
12:43:54 13 obtains a benefit from each and every element of the claim,  
12:43:57 14 and he did not attempt to do that.

12:44:00 15 Q. So what you said was with respect to use, Dr. Conte  
12:44:04 16 does not allege that end users control the entire system or  
12:44:09 17 benefit from each and every claim element; is that what you  
12:44:13 18 wrote in your report?

12:44:14 19 A. Among other things, yes.

12:44:17 20 Q. And did Dr. Conte address that in his report, based on  
12:44:22 21 your review?

12:44:22 22 A. I don't believe he did.

12:44:24 23 Q. Did he address it in front of the ladies and gentleman  
12:44:27 24 of the jury during this trial?

12:44:29 25 A. No, in fact, I think I recall him testifying that he

12:44:32 1 did not do an element-by-element benefit analysis.

12:44:35 2 Q. So can we cross that out, as well?

12:44:38 3 A. Yes, sir.

12:44:38 4 Q. Now, just to be clear, you did -- also did not do that

12:44:42 5 analysis?

12:44:43 6 A. Yes, sir, that's correct.

12:44:44 7 Q. Okay. Do you understand that -- who -- who -- what's

12:44:47 8 your understanding in this trial of who has the burden of

12:44:50 9 proving infringement?

12:44:52 10 A. My understanding is that the Plaintiff has the burden

12:44:59 11 to prove infringement.

12:44:59 12 Q. And is -- and are -- are your opinions and analysis

12:45:03 13 with respect to this divided infringement issue, sir, are

12:45:08 14 they in Paragraphs 161 and 162 in your report?

12:45:11 15 A. Yes, they are addressed in those paragraphs.

12:45:13 16 Q. So if there's not making, selling, importing, or using

12:45:30 17 under the law, what does that mean with respect to whether

12:45:33 18 there is or is not infringement in the situation where you

12:45:37 19 have infringement involving multiple entities or parties?

12:45:41 20 A. If I can -- it would be there -- means there's no

12:45:46 21 direct infringement as required under what I've been

12:45:48 22 instructed the standard is.

12:45:51 23 Q. Now, does any of your analysis mean that either you or

12:45:54 24 Dr. Conte is accusing the Wells Fargo customers of

12:45:58 25 infringing?

12:45:59 1 MR. SHEASBY: Objection, Your Honor, outside the  
12:46:00 2 scope of his report.

12:46:02 3 MR. MELSHEIMER: Precise -- that's actually the  
12:46:04 4 point, Your Honor, that he doesn't say that and that  
12:46:07 5 Dr. Conte doesn't say that. It was suggested -- we can  
12:46:11 6 approach if you'd like, Your Honor.

12:46:13 7 MR. SHEASBY: Your Honor, this is just  
12:46:15 8 argumentative. Dr. Villasenor has no discussion one way or  
12:46:19 9 another about the customer's responsibility. That is not  
12:46:21 10 in his report.

12:46:22 11 MR. MELSHEIMER: If I might -- if I might, Your  
12:46:24 12 Honor. It was --

12:46:24 13 THE COURT: Approach the bench, counsel.  
12:46:25 14 (Bench conference.)

12:46:37 15 MR. MELSHEIMER: Very straightforwardly, Your  
12:46:39 16 Honor, in the opening statement, Mr. Sheasby suggested that  
12:46:43 17 our theory was that our customers were infringing. And I'm  
12:46:46 18 simply asking him does any of his analysis or any of  
12:46:50 19 Dr. Conte's analysis accuse the customers of infringing.  
12:46:54 20 Of course it's not in his report. He didn't make that  
12:46:57 21 assertion. Neither did Dr. Conte. It's fair to respond to  
12:47:00 22 that. It's not argumentative. It's responsive to what was  
12:47:03 23 laid out in the opening statement.

12:47:06 24 MR. SHEASBY: We know, because there's no report  
12:47:08 25 up here, that it's clearly not in his report.

12:47:11 1 Dr. Villasenor provided no analysis whatsoever -- no  
12:47:13 2 analysis whatsoever as to whether the customer would be  
12:47:17 3 directly infringing the claims. By providing no analysis  
12:47:20 4 in his report, he's not entitled to provide any analysis  
12:47:22 5 now. This is just --

12:47:23 6 THE COURT: I agree he's not entitled to put on  
12:47:25 7 any analysis now. He is entitled to say he didn't do any  
12:47:27 8 analysis.

12:47:28 9 MR. MELSHEIMER: Or that Dr. Conte didn't do it  
12:47:30 10 either.

12:47:30 11 THE COURT: To his knowledge.

12:47:32 12 MR. MELSHEIMER: Right. Okay. That's all I was  
12:47:34 13 trying to do.

12:47:35 14 THE COURT: Overruled.

12:47:35 15 MR. MELSHEIMER: Okay. Thank you.

12:47:36 16 (Bench conference concluded.)

12:47:38 17 THE COURT: Let's proceed.

12:47:40 18 Q. (By Mr. Melsheimer) Did -- did you, sir,  
12:47:43 19 Dr. Villasenor, or to your knowledge, Dr. Conte, do any  
12:47:48 20 analysis in this case, either in front of the jury or in  
12:47:50 21 your reports, accusing any Wells Fargo customers of  
12:47:56 22 infringing the patents?

12:47:56 23 A. No, sir, I did not do that analysis.

12:47:58 24 Q. And did you hear Dr. Conte do that?

12:48:00 25 A. I did not.

12:48:01 1 Q. Is the infringement analysis you did on this -- on --  
12:48:08 2 strike that.

12:48:08 3 Is the infringement analysis that you told the  
12:48:10 4 jury about before lunch on this confirming step with  
12:48:15 5 respect to the '681 patent, is that separate and  
12:48:20 6 independent from your analysis of this divided infringement  
12:48:24 7 discussion that we just talked about?

12:48:25 8 A. Yes, that's right. That's a completely different point  
12:48:29 9 with respect to non-infringement. Although just to  
12:48:32 10 clarify, the -- the screen that's on now applies to both  
12:48:35 11 patents, in other words, the '605 and '681. Whereas the  
12:48:38 12 confirming step discussion only applies to the '681 patent.

12:48:41 13 Q. The divided infringement analysis of making, selling,  
12:48:44 14 importing and using, the legal standards for that, as you  
12:48:48 15 understand it, apply to both patents, but the confirming  
12:48:51 16 step analysis you did where you concluded that that step  
12:48:54 17 was missing from the Wells Fargo system, that only applies  
12:49:00 18 to the '681 patent; is that correct?

12:49:01 19 A. Yep -- yes, sir, that's correct.

12:49:04 20 Q. Were you asked to look at any other issues in this  
12:49:07 21 case?

12:49:08 22 A. Yes, sir, I was.

12:49:09 23 Q. Were you asked to address non-infringing alternatives?

12:49:12 24 A. Yes, sir, I was.

12:49:13 25 Q. What is your understanding of what a non-infringing

12:49:17 1 alternative is?

12:49:17 2 A. My understanding, as it's been explained to me, is that  
12:49:21 3 if a system is deemed to infringe, a non-infringing  
12:49:25 4 alternative is something where you could change something  
12:49:28 5 about the system and in doing so make it so it no longer  
12:49:33 6 infringes.

12:49:33 7 Q. Now, does that change any of your analysis that you've  
12:49:36 8 given the jury up to this point?

12:49:37 9 A. Not at all.

12:49:39 10 Q. Okay. Did you identify some non-infringing  
12:49:41 11 alternatives to the '605 and '681 patents?

12:49:43 12 A. Yes, there's one.

12:49:45 13 Q. All right. Let's take a look at that, sir.

12:49:50 14 So can you describe for the ladies and gentleman  
12:49:53 15 of the jury what is shown on Slide No. 25?

12:49:56 16 A. So this slide shows one of the claims -- this, in fact,  
12:50:00 17 is Claim 30 of the '681 patent, and in red. And then  
12:50:05 18 crossed out also, is a claim element relating to providing  
12:50:08 19 instructions to a customer. And even though the specific  
12:50:12 20 wording of this claim element regarding instructions has  
12:50:15 21 some variation across the claims, every one of the asserted  
12:50:19 22 claims has such a requirement.

12:50:21 23 And so if -- if the instructions were removed from  
12:50:25 24 the app, then it would clearly be non-infringing as -- and  
12:50:31 25 also add that it is feasible to do this. In fact, my

12:50:35 1 understanding is that USAA had a corporate representative  
12:50:36 2 who testified that it was feasible to remove the  
12:50:40 3 instructions to the user.

12:50:41 4 Q. And are you just basing that -- basing that on -- on  
12:50:45 5 his testimony?

12:50:46 6 A. Well, his testimony corroborates what I understand,  
12:50:49 7 independent also, that I understand it would be feasible.

12:50:52 8 Q. Would it be -- would it -- technically feasible?

12:50:56 9 A. Yes, sir, technically feasible.

12:50:58 10 Q. And -- okay. And would the cost of this alt -- we're  
12:51:02 11 about to hear from Mr. Gerardi. In your opinion, would the  
12:51:05 12 cost of this alternative, if it was adopted, be less than  
12:51:09 13 what Mr. Gerardi says the damages should be in this case if  
12:51:13 14 there is infringement found?

12:51:15 15 MR. SHEASBY: Objection, Your Honor. Not in his  
12:51:17 16 report.

12:51:20 17 MR. MELSHEIMER: I believe it is, Your Honor.

12:51:22 18 MR. SHEASBY: He can -- he can provide the number  
12:51:24 19 of what he proposes to be --

12:51:26 20 MR. MELSHEIMER: Paragraph 201, which I'm happy to  
12:51:33 21 provide the Court.

12:51:34 22 THE COURT: You'll need to do that.

12:51:36 23 MR. MELSHEIMER: I'm sorry, Your Honor, did you  
12:51:38 24 say please do that?

12:51:39 25 THE COURT: You will need to do that.

12:51:50 1 Approach the bench, counsel.

12:51:53 2 (Bench conference.)

12:52:01 3 MR. MELSHEIMER: There is a slight nuance to this,

12:52:04 4 Your Honor, which I'm happy to explain.

12:52:07 5 THE COURT: Well, your question involved him

12:52:09 6 speculating about what Dr. Gerardi was going to say.

12:52:13 7 MR. MELSHEIMER: Well, I think the objection is to

12:52:14 8 the -- Paragraph 201, which is what he's going to say it's

12:52:18 9 less -- this non-infringing alternative is less than

12:52:23 10 Mr. Gerardi's calculation of damages, which he knows what

12:52:26 11 it is. There is some nuance, and I'm - I'm happy to

12:52:28 12 explain that.

12:52:28 13 THE COURT: Well, let's start with the objecting

12:52:30 14 party's objection.

12:52:32 15 MR. SHEASBY: He has nothing in his report about

12:52:34 16 Mr. Gerardi. He can say that it would -- that he believes

12:52:36 17 it would cost less than \$8.5 million to do this

12:52:40 18 design-around. He's welcome to give that testimony.

12:52:42 19 Anything else is outside the scope of his report,

12:52:44 20 especially since he hasn't even testified yet.

12:52:46 21 THE COURT: All right. Now, what's your response?

12:52:47 22 MR. MELSHEIMER: Here's the problem, Your Honor.

12:52:49 23 As you know, the Plaintiff dropped a number of claims at

12:52:56 24 the last minute which changed the damages analysis of

12:52:57 25 Mr. Gerardi. And he had to do that based on these new

12:53:00 1 claims, which was basically done -- you know, I want to say  
12:53:03 2 literally over the weekend, but over the last few days.  
12:53:07 3 His original number was this number.

12:53:09 4 So he -- he will say it's less than -- he will say  
12:53:15 5 it's less than -- he doesn't know the new number. We've  
12:53:18 6 told him the new number, but he -- all he said in there was  
12:53:21 7 8.5 million.

12:53:22 8 THE COURT: He being whom?

12:53:25 9 MR. MELSHEIMER: Dr. Villasenor. And the point  
12:53:26 10 is, he's not going to be able to say -- there's a new  
12:53:31 11 number, which he's aware of. That new number is not  
12:53:35 12 written on this page because it couldn't have been written  
12:53:38 13 on this page because he calculated this number --  
12:53:41 14 Mr. Gerardi did.

12:53:41 15 THE COURT: Is this number less than this number  
12:53:43 16 that's on the page?

12:53:44 17 MR. MELSHEIMER: Yes, it is.

12:53:45 18 THE COURT: Then he can testify the number is less  
12:53:47 19 than \$8.5 million.

12:53:49 20 MR. SHEASBY: And without reference to  
12:53:50 21 Mr. Gerardi.

12:53:51 22 MR. MELSHEIMER: But there's no -- it's got to  
12:53:52 23 be -- the sole context for it, Judge, is that it's less  
12:53:56 24 than what he said. I don't understand what the problem  
12:53:58 25 with Gerardi is. He's about to testify. He's an expert.

12:54:01 1 I don't understand why that's an issue.

12:54:03 2 MR. SHEASBY: It's an issue because he should be  
12:54:05 3 bound by what's in his report. He didn't say Mr. Gerardi's  
12:54:08 4 number last time, and he shouldn't say it this time. He  
12:54:11 5 should say what's in his report.

12:54:11 6 MR. MELSHEIMER: Your Honor, of course, that is  
12:54:14 7 not -- that is a hypertechnical distinction, given that  
12:54:19 8 Mr. Gerardi has recalculated damages based on them taking  
12:54:23 9 actions at the last moment. I -- I don't --

12:54:27 10 THE COURT: What is it you want this witness to  
12:54:29 11 say, Mr. Melsheimer?

12:54:30 12 MR. MELSHEIMER: I want him to say it's  
12:54:32 13 substantially less than the number that Mr. Gerardi will  
12:54:34 14 offer to the jury of alleged damages in the case.

12:54:39 15 THE COURT: In light of his report,  
12:54:41 16 notwithstanding the last minute changes, I'm not going to  
12:54:43 17 let him say that.

12:54:44 18 MR. MELSHEIMER: Okay. But you will let him say  
12:54:46 19 it's less than \$8.5 million.

12:54:49 20 THE COURT: He can say what's right there.

12:54:49 21 MR. MELSHEIMER: Okay. Thank you.

12:54:53 22 (Bench conference concluded.)

12:54:53 23 THE COURT: All right. The objection is  
12:54:53 24 sustained. Let's proceed.

12:54:54 25 Q. (By Mr. Melsheimer) If you'll look at Paragraph 201 of

12:54:58 1 your report, sir. Just one -- one final question.

12:55:00 2 A. Yes, sir.

12:55:00 3 Q. Based on your experience, the alternatives that you  
12:55:03 4 just described to the jury, would they cost substantially  
12:55:08 5 less than \$8.5 million?

12:55:10 6 A. To implement.

12:55:13 7 MR. SHEASBY: Your Honor, objection,  
12:55:16 8 substantially.

12:55:16 9 THE COURT: Sustained.

12:55:17 10 MR. MELSHEIMER: Your Honor -- that is right out  
12:55:19 11 of his report, Your Honor. I can --

12:55:21 12 THE COURT: I just read the report. It says less  
12:55:23 13 than. It doesn't say substantially less than, unless I  
12:55:27 14 misread it.

12:55:28 15 MR. MELSHEIMER: With all due respect, Your Honor,  
12:55:29 16 it -- it does say substantially. I'm happy to show it to  
12:55:32 17 you.

12:55:33 18 THE COURT: Do you disagree with that,  
12:55:36 19 Mr. Sheasby?

12:55:36 20 MR. SHEASBY: I withdraw the objection.

12:55:45 21 THE COURT: All right. Let's leave it where it is  
12:55:47 22 then.

12:55:48 23 MR. MELSHEIMER: Can I restate the question, Your  
12:55:49 24 Honor?

12:55:50 25 THE COURT: Restate the question, as closely as

12:55:54 1 you can to what you just asked him.

12:55:57 2 Q. (By Mr. Melsheimer) Based on your experience, sir, the  
12:55:59 3 alternatives that you just described to the jury, would  
12:56:08 4 those -- to implement, would those cost substantially less  
12:56:08 5 than \$8.5 million?

12:56:09 6 A. Yes, sir.

12:56:13 7 MR. MELSHEIMER: May I have a moment, Your Honor?

12:56:14 8 THE COURT: Yes, you may have a moment.

12:56:29 9 MR. MELSHEIMER: May it please the Court,  
12:56:30 10 Your Honor. We -- we pass the witness for  
12:56:32 11 cross-examination.

12:56:32 12 THE COURT: All right. Cross-examination by  
12:56:34 13 Plaintiff.

12:56:34 14 CROSS-EXAMINATION

12:57:00 15 BY MR. SHEASBY:

12:57:00 16 Q. Good afternoon, Dr. Villasenor.

12:57:02 17 A. Good afternoon.

12:57:02 18 Q. It's nice to see you again. We've met previously?

12:57:05 19 A. Yes, sir, we have.

12:57:08 20 MR. SHEASBY: Now, if we could have Slide 15 from  
12:57:11 21 your presentation to the jury, please.

12:57:29 22 Q. (By Mr. Sheasby) One of the theories that you  
12:57:31 23 presented to the jury is that Wells Fargo should not be  
12:57:33 24 liable for infringement because all the claims in the  
12:57:36 25 patents are system claims, which require the use of a

12:57:39 1 user's cell phone application, fair?

12:57:43 2 A. I've been instructed they're all system claims, yes.

12:57:46 3 Q. Sir, you told the jury they're all system claims,

12:57:51 4 correct?

12:57:51 5 A. Yes.

12:57:52 6 Q. In fact, it's on the slide. It says infringement of

12:57:55 7 system claims, correct?

12:57:56 8 A. Yes, sir.

12:57:56 9 Q. You told the jury that every claim in the patent that's

12:58:01 10 at issue in this case was a system claim, correct?

12:58:03 11 A. Yes, sir.

12:58:04 12 Q. But, in fact --

12:58:04 13 MR. SHEASBY: Why don't we pull up the '681

12:58:06 14 patent, which is PX-1187, and let's turn to Claim 30.

12:58:25 15 Q. (By Mr. Sheasby) This is the '681 patent, Claim 30.

12:58:28 16 This is one of the patents that's asserted in this case,

12:58:32 17 correct?

12:58:32 18 A. Yes.

12:58:33 19 Q. And we can agree that the word "system," the actual

12:58:38 20 real-world system doesn't appear in this claim, correct?

12:58:41 21 A. Yes, sir.

12:58:41 22 Q. And Claim 13 recites, quote, non-transitory

12:58:46 23 computer-readable medium storing an app. Do you see that,

12:58:51 24 sir?

12:58:53 25 A. Yes.

12:58:53 1 Q. Claim 30 recites memory storing a software program,  
12:58:56 2 correct?  
12:58:56 3 A. Among other things, yes.  
12:58:58 4 Q. Claim 30 is describing storing a software program in  
12:59:08 5 non-volatile memory, correct?  
12:59:10 6 A. Yes.  
12:59:13 7 Q. Claim 30 is describing a software program stored on  
12:59:18 8 memory, correct?  
12:59:19 9 A. Yes. I've answered that. Yes.  
12:59:24 10 Q. Wells Fargo's mobile application is a software program,  
12:59:30 11 correct?  
12:59:30 12 A. Yes, sir.  
12:59:34 13 Q. And Wells Fargo stores its software program in  
12:59:38 14 non-transitory memory, correct?  
12:59:41 15 A. I'm not sure if I agree with that.  
12:59:45 16 Q. Wells Fargo's mobile application is stored in  
12:59:48 17 non-transitory memory, correct?  
12:59:51 18 A. Yes, that's right.  
12:59:53 19 Q. So for the ladies and gentlemen of the jury, Claim 30  
12:59:56 20 doesn't use the word "system," correct?  
12:59:58 21 A. Yes, that's right.  
01:00:00 22 Q. Claim 30 is describing storing a software program on  
01:00:03 23 non-volatile memory, correct?  
01:00:05 24 A. Yes.  
01:00:06 25 Q. Wells Fargo's mobile application is a software program,

01:00:10 1 correct?

01:00:10 2 A. Yes.

01:00:10 3 Q. And that software program is stored in non-transitory

01:00:12 4 memory, correct?

01:00:14 5 A. Yes.

01:00:14 6 Q. Who -- and the Wells Fargo mobile application is made

01:00:19 7 by Wells Fargo, correct?

01:00:20 8 A. I believe so.

01:00:22 9 Q. It's not made by the customer, correct?

01:00:24 10 A. Yes, that's right.

01:00:26 11 Q. And you told the ladies and gentlemen of the jury that

01:00:28 12 this claim was a system claim, correct?

01:00:30 13 A. Yes.

01:00:31 14 Q. And it doesn't say system anywhere, correct?

01:00:35 15 A. That's right.

01:00:35 16 Q. And the jury, when they go into the room to deliberate,

01:00:39 17 can take into account that you told the jury that this was

01:00:42 18 a system claim, Claim 30, correct?

01:00:43 19 A. Yes.

01:00:44 20 Q. And they can use their common sense and read the claim

01:00:47 21 to see if there's a reference to the word "system,"

01:00:50 22 correct?

01:00:50 23 A. Of course.

01:00:51 24 Q. They can use their common sense and hear your testimony

01:00:55 25 that this is -- claim is describing a software program on

01:00:57 1 non-volatile memory, correct?

01:00:59 2 A. Yes.

01:01:01 3 Q. Now, the other claims in the patent that are at issue

01:01:12 4 are system claims, correct?

01:01:14 5 A. Yes. The other claims are system claims, yes.

01:01:17 6 Q. And if you examine --

01:01:25 7 MR. SHEASBY: Let's pull up Claim 12, for example,

01:01:30 8 in the '681 patent.

01:01:31 9 Q. (By Mr. Sheasby) If you examine each and every element

01:01:40 10 of the patents-in-suit, none of them recite elements that

01:01:45 11 are to be formed by a user, as opposed to by a downloaded

01:01:49 12 application or the back end server, correct?

01:01:53 13 A. Yes. The user is not performing the steps, that's

01:01:56 14 right.

01:01:56 15 Q. None of the elements in any claim of the

01:02:00 16 patents-in-suit are performed by the user, correct?

01:02:03 17 A. I think that's right, yes.

01:02:05 18 Q. They're all performed by either the downloaded

01:02:08 19 application, correct, or the back end server?

01:02:13 20 A. I think there's multiple things recited so that's --

01:02:17 21 those are some of the things that are recited.

01:02:19 22 Q. Sir, why don't you turn to Tab 2 of your deposition?

01:02:23 23 A. I'm sorry?

01:02:24 24 Q. Tab 2 of your binders, which is your deposition from

01:02:27 25 Case 2.

01:02:32 1 A. Yes.

01:02:32 2 Q. And look at Line 69, 17 through 21.

01:02:44 3 A. I'm sorry, Line 69 or page --

01:02:46 4 Q. Page 69, Line 17 through 21.

01:02:50 5 A. Page 69, Line 17 through 21?

01:02:53 6 Q. Sir, for the system claims of the '605 and '681 patent,

01:02:59 7 you cannot identify any element of the claims that require

01:03:05 8 steps performed by the user, correct?

01:03:07 9 A. I think that's right, yes.

01:03:08 10 Q. And, in fact, at your deposition, you couldn't recall

01:03:15 11 any element that was required to be -- be performed by the

01:03:19 12 user, as opposed to by the downloaded application or the

01:03:24 13 back end software, correct?

01:03:25 14 A. I don't recall. I think that's right, yes.

01:03:28 15 Q. You have not offered any opinion the elements of the

01:03:32 16 system claims in the patents-in-suit are performed by the

01:03:34 17 user, correct?

01:03:35 18 A. I think that's correct, yes.

01:03:39 19 Q. The claims don't require that the user take any step

01:03:43 20 whatsoever, correct?

01:03:44 21 A. I believe that's correct, yes.

01:03:47 22 Q. Now, you spoke about the fact that an entity can be

01:04:09 23 liable for infringement if it makes or uses a system,

01:04:13 24 correct?

01:04:13 25 A. Yes. I mean, you're paraphrasing, but that's -- yes.

01:04:21 1 Q. And one of the ways you make a system is by assembling  
01:04:25 2 it, correct?

01:04:27 3 A. My understanding is that that can be assembling, yes.

01:04:31 4 Q. And so the mobile application that's used in the system  
01:04:40 5 is built by Wells Fargo, correct?

01:04:43 6 A. I assume that's the case. I don't -- haven't  
01:04:47 7 investigated, but I assume that's the case.

01:04:49 8 Q. So you understand that this case is about Wells Fargo's  
01:04:52 9 mobile remote deposit capture application, fair?

01:04:54 10 A. Yes, I understand that.

01:04:55 11 Q. And you're the technical expert in this case, fair?

01:04:57 12 A. Yes.

01:04:57 13 Q. And you didn't investigate whether Wells Fargo made the  
01:05:01 14 application that's at issue in this case?

01:05:03 15 A. I didn't investigate whether they had third-party  
01:05:07 16 contractors, for example.

01:05:09 17 THE COURT: Dr. Villasenor, you're going to have  
01:05:10 18 to speak up.

01:05:11 19 A. Okay. I didn't investigate whether they had  
01:05:14 20 third-party solutions also involved in making the app. I  
01:05:19 21 don't know.

01:05:19 22 Q. (By Mr. Sheasby) Okay. So you are providing testimony  
01:05:21 23 to the ladies and gentlemen of the jury about whether Wells  
01:05:25 24 Fargo makes this system, and you're saying it doesn't,  
01:05:27 25 fair?

01:05:27 1 A. No, that's not what I said.

01:05:36 2 Q. You're taking the position that Wells Fargo doesn't

01:05:39 3 make the Wells Fargo mobile remote deposit capture system,

01:05:43 4 correct?

01:05:43 5 A. Can you clarify what you mean by system?

01:05:46 6 Q. Sir, the system accused of infringement in this case,

01:05:54 7 does Wells Fargo make that system or doesn't it?

01:05:55 8 A. Well, to the extent that the system includes, as is

01:05:59 9 shown here, the customer's mobile phone, then, no.

01:06:02 10 Q. You did nothing to investigate whether Wells Fargo is

01:06:13 11 directing or controlling the conduct of, for example, the

01:06:17 12 customer, correct?

01:06:20 13 A. I didn't -- I don't recall specifically discussing

01:06:23 14 that.

01:06:28 15 Q. You provided no analysis whatsoever as to whether Wells

01:06:41 16 Fargo benefits from the elements of the claims at issue,

01:06:46 17 correct?

01:06:46 18 A. That's correct.

01:06:48 19 Q. And so one of the ways that you can infringe a system

01:06:55 20 claim is if Wells Fargo benefits from the elements of the

01:06:59 21 claims, correct?

01:07:01 22 A. I think if the proper test is conducted, each and every

01:07:06 23 element, I think that's right, yeah.

01:07:07 24 Q. So the question is, does Wells Fargo benefit from each

01:07:10 25 and every element of the mobile remote deposit capture

01:07:12 1 system recited in the claims, correct?

01:07:14 2 A. That is the question that can be asked, yes.

01:07:18 3 Q. And, in fact, it's a question that will determine

01:07:19 4 whether Wells Fargo is infringing as a user of the system

01:07:24 5 claims under your theory of the case, correct?

01:07:26 6 A. I don't actually agree.

01:07:31 7 Q. Now, we do know some things. We know that the Wells

01:07:36 8 Fargo mobile application at issue in this case will only

01:07:39 9 interface with Wells Fargo's servers; it won't interface

01:07:42 10 with the bank, correct?

01:07:43 11 A. I'm sorry, I'm not sure what you mean by it won't

01:07:45 12 interface with the bank.

01:07:46 13 Q. It won't interface with any other bank, sir?

01:07:49 14 A. I think that's right, yes.

01:07:50 15 Q. You don't identify any user parameters that the user

01:07:54 16 can control on Wells Fargo's Mobile Deposit system,

01:07:58 17 correct?

01:07:58 18 A. Oh, I don't recall.

01:08:00 19 Q. You don't identify any aspects of the rules or

01:08:03 20 processes that are used for Wells Fargo's Mobile Deposit

01:08:08 21 that can be set by the user, as opposed to the bank,

01:08:11 22 correct?

01:08:11 23 A. I don't recall.

01:08:15 24 Q. Sir, you told the ladies and gentlemen of the jury that

01:08:23 25 Wells Fargo must benefit from each and every element of the

01:08:27 1 claims of the patents, correct?

01:08:30 2 A. I said that that was one of the tests.

01:08:33 3 Q. You don't even know what the word "benefit" means,

01:08:36 4 correct?

01:08:36 5 A. I -- I know in a legal -- in a general sense, but not

01:08:40 6 the legal definition.

01:08:41 7 Q. You don't know what a benefit is for the purpose of

01:08:45 8 this analysis, correct?

01:08:47 9 A. I don't have a specific opinion on what a benefit is,

01:08:51 10 that's correct.

01:08:51 11 Q. For example, you don't know if saving \$2.50 per check

01:08:56 12 every time a deposit is made is a benefit, correct?

01:08:59 13 A. That sounds like a benefit.

01:09:01 14 Q. So we agree that Wells Fargo, when it saves \$2.54 every

01:09:08 15 time it deposits a check that would have otherwise gone

01:09:11 16 through the teller, that sounds like a benefit to you,

01:09:13 17 fair?

01:09:13 18 A. If that number is correct in the broad sense, saving

01:09:18 19 money would be a benefit, yes.

01:09:19 20 Q. Well, sir, you were in the court every single day,

01:09:23 21 correct?

01:09:23 22 A. Yes, sir.

01:09:24 23 Q. You heard Ms. Lockwood-Stein testify under oath that

01:09:26 24 every time a user deposits a check through mobile as

01:09:31 25 opposed to through a teller, they save \$2.54, correct?

01:09:36 1 A. I actually didn't remember that number.

01:09:37 2 Q. You don't remember the number?

01:09:39 3 A. I haven't memorized every number I've heard in the last

01:09:42 4 week, no.

01:09:43 5 Q. But we do know this, from a matter of common sense,

01:09:45 6 saving multiple dollars every time a check is deposited,

01:09:49 7 that sounds like a benefit, doesn't it, Professor

01:09:53 8 Villasenor?

01:09:53 9 A. I think, in general, saving money would be a benefit,

01:09:56 10 yeah.

01:09:56 11 Q. And you understand that the claims of the

01:09:59 12 patents-in-suit are directed to mobile remote deposit

01:10:02 13 capture systems, correct?

01:10:03 14 A. I -- I understand that the claims are addressed there,

01:10:12 15 addressing systems, yes, with -- for -- with a computer and

01:10:15 16 an image acquired by a camera.

01:10:19 17 Q. Sir, the claims are directed at mobile remote deposit

01:10:25 18 capture, correct?

01:10:25 19 A. Again, the -- I don't think that phrase is used, but it

01:10:29 20 certainly addresses -- the claims address a portable device

01:10:32 21 and a mobile device.

01:10:32 22 Q. Sir, do you know that the claims of the patents are

01:10:37 23 directed at mobile remote deposit capture?

01:10:38 24 A. They -- well, they are in some cases, but it doesn't

01:10:44 25 mean that -- I want to be careful not to give an overly

01:10:48 1 broad answer that might be misconstrued.

01:10:50 2 Q. Sir, can you answer the question as to whether the

01:10:53 3 claims are directed at the mobile remote deposit capture?

01:10:55 4 A. They're directed to certain kinds of mobile remote

01:10:59 5 deposit capture.

01:10:59 6 Q. And it's mobile remote deposit capture that is saving

01:11:04 7 Wells Fargo money every time a system is used, fair?

01:11:07 8 A. Again, I don't have my own opinion on that, but I heard

01:11:14 9 testimony that it does save money, yes.

01:11:18 10 Q. You don't have any own opinion as to whether Wells

01:11:21 11 Fargo benefits from the system it uses?

01:11:24 12 A. I didn't -- I wasn't asked to do an -- an economic

01:11:28 13 analysis, so I didn't do that.

01:11:30 14 Q. Sir, you've been testifying that one of the analyses

01:11:34 15 that needs to occur is to whether Wells Fargo benefits from

01:11:38 16 each and every element of the claims, correct?

01:11:41 17 A. That's one -- it -- that's -- sort of. It's one of the

01:11:46 18 tests for that particular infringement evaluation, but it's

01:11:50 19 not necessary if someone satisfies another product such

01:11:55 20 that it makes.

01:11:56 21 Q. So you didn't do any analysis as to whether Wells Fargo

01:12:00 22 benefits from its system, correct?

01:12:01 23 A. At the level of each element, that's correct, I did

01:12:07 24 not.

01:12:07 25 Q. So you didn't do any analysis of whether Wells Fargo

01:12:10 1 benefits from its system, correct?

01:12:12 2 A. That's probably right, yes.

01:12:14 3 Q. Now, you also talked about what I'll call technical

01:12:20 4 infringement arguments, where you actually think particular

01:12:23 5 elements of the claims are not met, fair?

01:12:27 6 A. Yes, that's right.

01:12:28 7 Q. And, in fact, I think in your deposition, we called

01:12:30 8 them technical elements, fair?

01:12:32 9 A. I don't recall. That may be right.

01:12:35 10 Q. Now, there are two patents at issue in this case. One

01:12:39 11 is the '605 patent, fair?

01:12:40 12 A. Yes.

01:12:40 13 Q. And you put up no slide and said absolutely nothing

01:12:46 14 about the technical issues associated with the '605 patent,

01:12:49 15 correct?

01:12:49 16 A. To use your terminology about technical issues, that's

01:12:54 17 correct, yes.

01:12:55 18 Q. In fact, you're not disputing that in the systems,

01:12:58 19 which is the mobile app running the mobile phone -- app on

01:13:02 20 the mobile phone plus the back end servers, you're not

01:13:04 21 disputing that every single limitation of the '605 patent

01:13:08 22 is present, correct?

01:13:10 23 A. I have not offered a technical opinion on the -- any of

01:13:14 24 those claim elements, that's right.

01:13:16 25 Q. Sir, for the ladies and gentlemen of the jury, are you

01:13:20 1 disputing in your direct testimony that any element of the  
01:13:26 2 '605 patent is not met?

01:13:27 3 A. Putting -- putting aside the divided infringement  
01:13:31 4 argument, I am not disputing that.

01:13:33 5 Q. From a technical standpoint, you're not disputing that  
01:13:36 6 every element of the claims of the '605 patent are met,  
01:13:39 7 fair?

01:13:39 8 A. Yes, that's right.

01:13:41 9 Q. Now, for the '681 patent, there is only a -- one  
01:13:46 10 element that you're asserting as not met, correct?

01:13:50 11 A. Yes, sir, that's right.

01:13:57 12 MR. SHEASBY: And why don't we pull up Slide 12 of  
01:14:12 13 your demonstratives.

01:14:31 14 Actually, let's pull up Slide 11.

01:14:35 15 Q. (By Mr. Sheasby) Now, this is the slide you showed the  
01:14:40 16 jury, correct?

01:14:41 17 A. Yes, sir.

01:14:42 18 Q. And what you told the ladies and gentlemen of the jury  
01:14:46 19 is that the actual process of optical character recognition  
01:14:51 20 determining an amount of the check must occur solely on the  
01:14:54 21 mobile device, correct?

01:14:55 22 A. I don't think I used that word, no.

01:15:00 23 Q. Does it have to occur solely on the mobile device, or  
01:15:03 24 can the server assist it?

01:15:04 25 A. It must occur on the mobile device.

01:15:06 1 Q. Okay. Now --

01:15:09 2 A. In the claim. I just want to clarify, yes, in the

01:15:12 3 claim.

01:15:12 4 Q. Now, I notice that there's part of that passage that

01:15:14 5 you didn't underline.

01:15:16 6 It says: The system performs optical character

01:15:20 7 recognition. Do you see that?

01:15:21 8 A. Yes.

01:15:25 9 Q. System performs optical character recognition?

01:15:30 10 A. Yes, sir.

01:15:31 11 Q. The word "system" is a different word from the word

01:15:37 12 "digital camera," correct?

01:15:39 13 A. Yes, that's right.

01:15:40 14 Q. And what this claim describes and what it says is that

01:15:43 15 the system performs optical character -- character

01:15:45 16 recognition, correct?

01:15:45 17 A. That's what that highlighting says, yes.

01:15:48 18 Q. And in the claims -- in Claim 12, the system

01:15:52 19 encompasses not just the mobile device, it encompasses the

01:15:58 20 downloaded app and the computer associated with the bank

01:16:01 21 that is not on the mobile device, correct?

01:16:02 22 A. Yes, that's right.

01:16:06 23 Q. So to level set, you told the jury that Claim 12

01:16:12 24 requires that the mobile device perform the optical

01:16:16 25 character recognition, fair?

01:16:17 1 A. That's what I believe the claim requires, yes.

01:16:19 2 Q. You didn't highlight the portion of the claim that says

01:16:22 3 the system performs optical character recognition, correct?

01:16:25 4 A. Yes, that's right.

01:16:26 5 Q. And, in fact, you didn't tell the jury that in Claim

01:16:30 6 12, the system encompasses not just the mobile device, it

01:16:36 7 also encompasses the servers on the back end, correct?

01:16:41 8 A. Actually, I believe I did describe the system as having

01:16:45 9 those -- both of those elements, I believe.

01:16:48 10 Q. Sir, the word "system" encompasses not just the mobile

01:16:51 11 device. It encompasses the downloaded application in a

01:16:54 12 computer associated with the bank --

01:16:56 13 THE COURT: Slow down, Mr. Sheasby, please.

01:16:57 14 MR. SHEASBY: Yes, Your Honor.

01:16:58 15 Q. (By Mr. Sheasby) Sir, the word "system" in Claim 12

01:17:04 16 encompasses not just the mobile device, it encompasses the

01:17:08 17 downloaded app in a computer associated with the bank that

01:17:11 18 is not on the mobile device, fair?

01:17:13 19 A. Yes, I agree with that.

01:17:14 20 Q. Now, one of the issues you talked about is source code.

01:17:21 21 You told the ladies and gentlemen of the jury that you've

01:17:22 22 read source code in preparation for your testimony, fair?

01:17:26 23 A. I have looked at some source code, yes.

01:17:28 24 Q. But you've actually never gone and read source code in

01:17:31 25 this case, correct?

01:17:33 1 A. I have read some source code in this case.

01:17:37 2 Q. Sir, you've never gone to the computer where the source

01:17:40 3 code is securely stored and read it, correct?

01:17:42 4 A. I haven't read it on that computer, that's correct.

01:17:44 5 Q. The only source code you ever read was the source code

01:17:47 6 that was in Professor Conte's report, correct?

01:17:49 7 A. Yes, that's correct.

01:17:50 8 Q. And, in fact, at your deposition, we noted the fact

01:17:55 9 that -- that you've made mistakes in your reading of source

01:17:59 10 code in the past, correct?

01:18:00 11 A. I have made mistakes, yes.

01:18:02 12 Q. And, in fact, in the preparation of your report in this

01:18:05 13 case, you made mistakes in your reading of source code,

01:18:07 14 correct?

01:18:07 15 A. I'm only aware of one.

01:18:10 16 Q. You made one mistake in the reading of the source code

01:18:13 17 in this case, correct?

01:18:15 18 A. One that I can think of.

01:18:16 19 Q. And, in fact, the mistake you made is you thought a

01:18:20 20 step was performed on the server when it was performed on

01:18:23 21 the device, correct?

01:18:24 22 A. That's right, yeah.

01:18:25 23 Q. And so it'd be fair to say, and the jury can balance

01:18:28 24 the fact, that you have historically made mistakes in your

01:18:31 25 written report about the operation of source code, fair?

01:18:34 1 A. I disagree.

01:18:37 2 Q. You don't believe the jury should take into account

01:18:40 3 that you've made mistakes in your interpretation of source

01:18:43 4 code?

01:18:43 5 A. I don't know what mistakes, plural, you're speaking of.

01:18:46 6 Q. Do you believe the jury should take into account that

01:18:52 7 you made a mistake when you previously analyzed source code

01:18:56 8 in this case?

01:18:57 9 A. I believe the jury can make its own decision.

01:19:00 10 Q. Now, you told the ladies and gentlemen of the jury that

01:19:24 11 you thought there was a non-infringing alternative to the

01:19:26 12 patents-in-suit, correct?

01:19:28 13 A. Yes, sir.

01:19:28 14 Q. You told them you just don't need to give instructions

01:19:32 15 to the users, correct?

01:19:33 16 A. I said that that was a non-computer term, but yes.

01:19:37 17 Q. You told them it was viable, correct?

01:19:39 18 A. I believe "feasible" is the word I used.

01:19:41 19 Q. The reality is, is that you did nothing to investigate

01:19:45 20 whether what you describe as a non-infringing alternative

01:19:47 21 would be commercially viable, correct?

01:19:50 22 A. That -- that's right. I was focused on technical

01:19:54 23 feasibility, that's right.

01:19:55 24 MR. SHEASBY: Your Honor, objection,

01:19:59 25 non-responsive.

01:20:08 1 THE COURT: The answer "that's right" is correct.

01:20:10 2 I'll strike the remainder of the answer.

01:20:13 3 Q. (By Mr. Sheasby) You did nothing to investigate

01:20:15 4 whether any of these alternatives you describe as

01:20:20 5 non-infringing are legal or even allowed under the

01:20:23 6 regulations that govern banking, correct?

01:20:26 7 A. That's correct.

01:20:26 8 Q. You don't even know whether building the non-infringing

01:20:30 9 system you're talking about would be within the risk

01:20:32 10 compliance standards set up by Wells Fargo, correct?

01:20:36 11 A. I was not asked to investigate that, that's correct.

01:20:38 12 Q. You did nothing to calculate the number of different

01:20:49 13 regulatory functions and surveillance functions and

01:20:54 14 operation parameters that would have to change for Wells

01:20:56 15 Fargo to remove the functionality that you describe,

01:21:00 16 correct?

01:21:00 17 A. Yes, sir, that's correct.

01:21:03 18 Q. You believe that somebody who is not aware of the

01:21:06 19 relevant laws probably shouldn't be in a position of

01:21:08 20 authority to make decisions about commercial systems in

01:21:12 21 banking, correct?

01:21:13 22 A. I think that's a fair statement, yeah.

01:21:15 23 Q. You're not in that position, correct?

01:21:17 24 A. I'm sorry, I'm not sure I understand the question.

01:21:21 25 Q. You're not aware of the laws and regulations and

01:21:24 1 procedures that would be necessary to consider as to  
01:21:26 2 whether your non-infringing alternative would be  
01:21:27 3 commercially viable, correct?  
01:21:28 4 A. I don't know all of the laws for the banking  
01:21:31 5 regulations around that, that's right.  
01:21:33 6 Q. Do you know any of them?  
01:21:34 7 A. I'm familiar with some of the -- the laws, but I don't  
01:21:38 8 know how they would necessarily relate to the  
01:21:41 9 non-infringing alternative I mentioned.  
01:21:43 10 Q. Now, there is one person in this courtroom who could  
01:21:48 11 have considered, from a business standpoint, whether the  
01:21:53 12 system you describe was commercially viable, correct?  
01:21:56 13 A. I'm not sure who you're referring to.  
01:21:58 14 Q. Well, Mr. Saffici, he spent 40 years in his system.  
01:22:02 15 He's an absolute expert in business, correct?  
01:22:06 16 A. I actually think that's incorrect. I think he has  
01:22:09 17 spent 53 years in the system.  
01:22:11 18 Q. Mr. Saffici has spent 53 years as a business expert in  
01:22:13 19 this system, correct?  
01:22:14 20 A. In banking and checking, yeah, that's how long he's  
01:22:17 21 spent, yes.  
01:22:18 22 Q. He did nothing to explain to you whether what you're  
01:22:25 23 proposing to the jury was commercially viable or not,  
01:22:29 24 correct?  
01:22:29 25 A. I didn't have a conversation with him about that, that

01:22:32 1 I can recall.

01:22:33 2 Q. You didn't ask him whether it's commercially viable or  
01:22:36 3 not, correct?

01:22:36 4 A. I think that's right, yeah.

01:22:38 5 Q. So what we have is we have Mr. Hecht, Wells Fargo's  
01:22:43 6 corporate representative, who testified. We had  
01:22:47 7 Mr. Saffici, who was a business expert in RDC, testify.  
01:22:51 8 And not one of those people -- not one of those people that  
01:22:53 9 have decades and decades and decades of experience in  
01:22:57 10 banking testified that your non-infringing alternative is  
01:22:59 11 commercially viable, fair?

01:23:00 12 A. I don't believe they testified to that particular  
01:23:04 13 point, that's right.

01:23:05 14 MR. SHEASBY: I pass the witness, Your Honor.

01:23:06 15 THE COURT: Redirect, Mr. Melsheimer?

01:23:08 16 MR. MELSHEIMER: Just briefly, Your Honor.

01:23:11 17 THE COURT: While he's going to the podium,  
01:23:14 18 Dr. Villasenor, you're going to have to speak up. You're  
01:23:17 19 just really whispering over there. I know you're close to  
01:23:20 20 the microphone.

01:23:21 21 THE WITNESS: I'm sorry.

01:23:22 22 THE COURT: Just make it louder coming out of your  
01:23:25 23 voice.

01:23:25 24 THE WITNESS: I'm sorry, Your Honor.

01:23:26 25 THE COURT: All right. Mr. Melsheimer.

01:23:26 1                           REDIRECT EXAMINATION

01:23:27 2 BY MR. MELSHEIMER:

01:23:27 3 Q. Dr. Villasenor, just a couple of questions. Does

01:23:30 4 claim -- you were asked about Claim 30 and whether or not

01:23:32 5 it was a system claim?

01:23:34 6 A. Yes, sir.

01:23:34 7 Q. Does -- does Claim 30 involve multiple entities as

01:23:38 8 accused by Mr. -- as accused by Dr. Conte?

01:23:42 9                           MR. SHEASBY: Your Honor, may we approach? I

01:23:48 10 have an objection.

01:23:49 11                           MR. MELSHEIMER: You know, I'll withdraw the

01:23:50 12 question in the interest of time, if that's all right.

01:23:51 13                           THE COURT: Then let's move on.

01:23:55 14 Q. (By Mr. Melsheimer) Is saving -- you were asked some

01:24:00 15 questions about benefits, Your Honor -- Dr. Villasenor, you

01:24:03 16 were asked some questions about saving money for the bank?

01:24:06 17 A. Yes, sir.

01:24:07 18 Q. Is saving money for the bank one of the claim elements

01:24:10 19 of the patents in this case?

01:24:12 20 A. No, sir, there's no specific element that's -- recites

01:24:17 21 saving money.

01:24:18 22 Q. Was it your job, as you understood it, to investigate

01:24:22 23 and prove up the benefits of each claim element in this

01:24:24 24 case?

01:24:24 25 A. No, sir, that was not my job.

01:24:26 1 Q. Whose job was that?

01:24:28 2 A. My understanding is that the burden to establish

01:24:31 3 infringement falls on -- on the Plaintiff.

01:24:33 4 Q. Now, with respect to this question you were asked about

01:24:36 5 the mistake that you made in the source code. You -- you

01:24:40 6 made one mistake; is that your testimony?

01:24:43 7 A. Yes, sir.

01:24:45 8 Q. Okay. And does that mistake that you made have

01:24:48 9 anything to do with what you told the jury this morning

01:24:53 10 about this confirming step analysis?

01:24:55 11 A. Not at all.

01:24:56 12 Q. Do you know why that was brought up?

01:24:59 13 A. I can't speculate as to what Mr. Sheasby was thinking.

01:25:04 14 MR. MELSHEIMER: May I have a moment, Your Honor?

01:25:05 15 THE COURT: You may.

01:25:14 16 MR. MELSHEIMER: No further questions, Your Honor.

01:25:16 17 Thank you, Dr. Villasenor.

01:25:17 18 THE COURT: Do you have additional

01:25:18 19 cross-examination, Mr. Sheasby?

01:25:19 20 MR. SHEASBY: Your Honor, no additional

01:25:21 21 cross-examination.

01:25:22 22 THE COURT: Then you may step down,

01:25:23 23 Dr. Villasenor.

01:25:24 24 THE WITNESS: Thank you, Your Honor.

01:25:24 25 MR. SHEASBY: Your Honor, with your permission,

01:25:25 1 may I clear the binders?

01:25:27 2 THE COURT: Pardon?

01:25:27 3 MR. SHEASBY: May I clear the binders -- remove

01:25:30 4 the demonstratives for the next witness.

01:25:34 5 THE COURT: Well, let's see what the Defendant's

01:25:36 6 next witness is. I appreciate the offer.

01:25:39 7 But, Defendant, call your next witness.

01:25:43 8 MS. WILLIAMS: Thank you, Your Honor. We call

01:25:45 9 Mr. Chris Gerardi.

01:25:46 10 THE COURT: All right. If you'll come forward and

01:25:48 11 be sworn, please, Mr. Gerardi.

01:26:12 12 (Witness sworn.)

01:26:13 13 THE COURT: Please come around, sir. Have a seat

01:26:14 14 on the witness stand.

01:26:27 15 MS. WILLIAMS: Your Honor, may I provide the

01:26:31 16 witness with a binder, as well as opposing counsel?

01:26:35 17 THE COURT: You may approach.

01:26:37 18 THE WITNESS: May I move these out of the way?

01:26:40 19 THE COURT: The CSO will help you.

01:26:56 20 All right. Ms. Williams, you may proceed.

01:26:59 21 MS. WILLIAMS: Thank you, Your Honor. May it

01:27:01 22 please the Court.

01:27:01 23 CHRIS GERARDI, DEFENDANT'S WITNESS, SWORN

01:27:01 24 DIRECT EXAMINATION

01:27:01 25 BY MS. WILLIAMS:

01:27:04 1 Q. Will you introduce yourself to the jury?

01:27:05 2 A. Sure. Good afternoon. I'm Chris Gerardi.

01:27:07 3 Q. Will you please tell us a little bit about yourself?

01:27:10 4 A. Sure. My wife and I live in the Jacksonville, Florida

01:27:11 5 area. We've been married 30 years this year. Three grown

01:27:12 6 children.

01:27:12 7 I grew up in Worcester, Massachusetts, one of

01:27:18 8 three boys to a single mom. Spent my time working through

01:27:24 9 school at my uncle's plumbing shop, stocking shelves and

01:27:24 10 cutting pipe and doing any other odd jobs that were asked

01:27:27 11 of me.

01:27:27 12 Q. You mentioned you went to school. Where did you go to

01:27:29 13 college?

01:27:29 14 A. My undergraduate degree I received from the University

01:27:32 15 of Massachusetts at Dartmouth in economics, and I received

01:27:36 16 my Master's degree in banking, finance, and money

01:27:41 17 management several years later from a school called Adelphi

01:27:44 18 University.

01:27:44 19 Q. What is your role in this case?

01:27:46 20 A. I've been asked to do three things. One is to talk and

01:27:51 21 comment about the damages opinions presented by

01:27:53 22 Mr. Weinstein; two, is to comment on some of the damages

01:27:56 23 and opinions presented by Mr. Calman; and, three, is to

01:28:00 24 evaluate the damages should liability be found in this

01:28:04 25 matter that Wells Fargo may -- may be obligated to pay.

01:28:09 1 Q. Let's talk about what qualifies you to provide those  
01:28:11 2 opinions in this case.

01:28:12 3 Can you please tell the jury where you work?

01:28:16 4 A. Sure. Currently I'm a vice president with a company  
01:28:19 5 called Charles River Associates.

01:28:24 6 We provide a variety of economic and financial  
01:28:27 7 accounting type services to companies both in the  
01:28:27 8 litigation and non-litigation typesetting. Prior to that,  
01:28:30 9 I spent 16 years with a company called FTI Consulting where  
01:28:35 10 I co-led the disputes practice and the intellectual  
01:28:38 11 property practice.

01:28:39 12 And, again, we provided the same types of  
01:28:41 13 services, a variety of accounting and corporate finance,  
01:28:45 14 accounting and finance services. I was a partner at KPMG,  
01:28:51 15 which is one of the largest accounting firms in the world,  
01:28:53 16 before that.

01:28:54 17 Q. During your time at Charles River Associates, FTI, and  
01:29:01 18 KPMG, have you had experience in calculating damages in  
01:29:05 19 patent matters such as this?

01:29:06 20 A. Yes, I have. I've worked north of 75 to a hundred  
01:29:09 21 different types of intellectual property matters such as  
01:29:12 22 this.

01:29:12 23 Q. Have any of those involved the banking industry?

01:29:14 24 A. Yes, several of them have. I worked on matters for  
01:29:19 25 banks such as Bank of America, Citibank, JPMorgan Chase,

01:29:24 1 HSBC, and several other banks.

01:29:26 2 Q. Has your work involved assisting companies with valuing  
01:29:30 3 intellectual property?

01:29:31 4 A. Yes. So even outside of the context of litigation,  
01:29:35 5 when a company has intellectual property that it's looking  
01:29:38 6 to license or do something with, I'll help them evaluate  
01:29:40 7 the markets that they may be applicable to, identify  
01:29:44 8 companies that they may be interested in talking to  
01:29:47 9 licensing about, and helping them frame what the economics  
01:29:50 10 of the licensing may look like so when they have those  
01:29:54 11 negotiations, they have informed decisions about how to go  
01:29:57 12 about that licensing discussion or that licensing  
01:29:59 13 negotiation.

01:29:59 14 Q. Have you given presentations or written articles about  
01:30:05 15 intellectual property valuation?

01:30:06 16 A. Yes. Over the course of my 30 years, I have spoken at  
01:30:10 17 many conferences. I've authored chapters in books having  
01:30:16 18 to do with the calculation of patent damages, presented at  
01:30:20 19 various bar associations, and actually taught some courses  
01:30:23 20 at some universities about this type of subject.

01:30:24 21 Q. How many years have you been working in the area of  
01:30:29 22 economic damages for intellectual property?

01:30:30 23 A. I'm pushing 30 years now.

01:30:34 24 Q. Have you ever been qualified as an expert in the area  
01:30:37 25 of damages?

01:30:38 1 A. Yes, I have.

01:30:40 2 Q. Is CR -- sorry, is Charles River Associates, the

01:30:45 3 company that you work for, being compensated for the work

01:30:47 4 that you're doing in this case?

01:30:49 5 A. Yes, they are.

01:30:50 6 Q. What is your -- what is the rate for your work that

01:30:55 7 Charles River Associates is being paid?

01:30:55 8 A. CRA receives \$725.00 an hour for my time.

01:30:59 9 Q. Approximately how many hours have you spent on this

01:31:02 10 case?

01:31:02 11 A. Myself, a hundred to 125 hours.

01:31:08 12 MS. WILLIAMS: Your Honor, at this time we tender

01:31:10 13 Mr. Gerardi as an expert on the valuation of intellectual

01:31:13 14 property and the calculation of patent damages.

01:31:15 15 THE COURT: Is there objection?

01:31:16 16 MR. SHEASBY: No objection, Your Honor.

01:31:19 17 THE COURT: Without objection, the Court will

01:31:21 18 recognize this witness as an expert in those designated

01:31:23 19 fields.

01:31:24 20 You may continue, counsel.

01:31:26 21 MS. WILLIAMS: Thank you, Your Honor.

01:31:26 22 Q. (By Ms. Williams) Mr. Gerardi, let's turn to the work

01:31:30 23 you did in this case. You mentioned that you were asked to

01:31:33 24 do -- to do three things. What were those three things?

01:31:36 25 A. Again, one, evaluate the report that was submitted by

01:31:40 1 Mr. Weinstein; second, to evaluate the damages related to  
01:31:44 2 the report submitted by Mr. Calman; and, then, third,  
01:31:48 3 provide my own independent assessment of what the economic  
01:31:52 4 damages would be should the jury find that USAA prevails on  
01:31:55 5 its claims against Wells Fargo.

01:31:56 6 Q. Are you providing any opinion on infringement?

01:31:59 7 A. No, I'm not.

01:32:00 8 Q. Are you providing any opinion on the invalidity of  
01:32:04 9 these patents?

01:32:05 10 A. No, I'm not.

01:32:06 11 Q. So by providing your testimony today to the jury, are  
01:32:10 12 you in any way suggesting that Wells Fargo should pay  
01:32:14 13 damages in this case?

01:32:15 14 A. No, I'm not.

01:32:16 15 Q. All right. Let's -- will you describe for us what  
01:32:21 16 materials you asked for and what you reviewed in this case?

01:32:24 17 A. Sure. So in the course of conducting these types of  
01:32:27 18 analyses, obviously, there's information you're going to  
01:32:31 19 want to obtain from the parties. And so documents from  
01:32:34 20 both Wells Fargo and -- and USAA. Since this related to  
01:32:38 21 the banking aspect and the MRDC aspect of what Wells Fargo  
01:32:41 22 is accused of doing, I asked for a variety of their related  
01:32:46 23 information. So I reviewed that information from -- from  
01:32:51 24 Wells Fargo.

01:32:51 25 We obtained and saw some of the depositions you've

01:32:55 1 seen here from many of the parties, that were taken in this  
01:32:58 2 case. Obviously, I reviewed Dr. Villasenor's report,  
01:33:02 3 Mr. Saffici's report, and that of Mr. -- Mr. Weinstein and  
01:33:07 4 Mr. Calman. Some publicly available information we  
01:33:11 5 obtained on our own to fill in some -- some blanks there.

01:33:16 6 I spent a lot of time talking with Mr. Hecht. And  
01:33:18 7 spent some time with various other Wells Fargo's  
01:33:24 8 employees: Mr. Rosati, who was one of the product  
01:33:27 9 managers; Ms. Lockwood-Stein, who I believe you saw on  
01:33:29 10 videotape; Mr. Ajami. And then, again, obviously spent  
01:33:33 11 some time talking with Mr. Villasenor and Mr. Saffici.

01:33:37 12 And then I relied upon my experience in working on  
01:33:39 13 several other patent matters, particularly some in the  
01:33:40 14 banking industry having to do with various payment  
01:33:42 15 processing systems.

01:33:44 16 Q. Why did you speak with Dr. Villasenor?

01:33:48 17 A. I'm not a technical expert. I'm an economist. So I  
01:33:52 18 needed to understand from a technical perspective what was  
01:33:56 19 being accused of infringement, as he described previously,  
01:34:00 20 and I also spoke to him about the non-infringing  
01:34:02 21 alternative that he identified.

01:34:03 22 Q. You mentioned that you spoke with Mr. -- with  
01:34:06 23 Mr. Hecht. Why did you speak with Mr. Hecht?

01:34:09 24 A. So in the context of ultimately preparing my damage  
01:34:12 25 analysis, I needed to understand the Wells Fargo's systems

01:34:16 1 and I needed to understand how those front end systems that  
01:34:19 2 we were talking about previously and those back end systems  
01:34:21 3 you heard about, how they worked and how they were put  
01:34:24 4 together and kind of the history of those. And, obviously,  
01:34:27 5 Mr. Hecht in his role as -- as one of the senior folks at  
01:34:31 6 bank of -- at Wells Fargo, he also gave me some of that  
01:34:35 7 information to help me form my opinions.

01:34:37 8 Q. You also mentioned that you spoke with Mr. Saffici.

01:34:40 9 Why did you speak with Mr. Saffici?

01:34:42 10 A. Mr. Saffici gave me, again, some -- some general  
01:34:45 11 background as to that back end -- those back end-type  
01:34:50 12 systems; how long they were there; what were banks doing  
01:34:52 13 over the courses of years to help process those items.

01:34:55 14 So his item processing experience over the years  
01:34:58 15 was helpful to me to understand and evaluate the damages in  
01:35:01 16 this case.

01:35:02 17 Q. Have you attended trial?

01:35:04 18 A. Oh, yes, I've been here since the opening statements.

01:35:06 19 Q. Are you prepared today to discuss the opinions that you  
01:35:09 20 have in this case?

01:35:10 21 A. Yes, I am.

01:35:11 22 Q. All right. Before we go into the details of your  
01:35:13 23 opinions, can you please give us a high level summary of  
01:35:17 24 what they are?

01:35:18 25 A. Sure. So -- and, again, this is something I think that

01:35:23 1 Mr. Weinstein and I both agree upon. Our job as damages  
01:35:25 2 experts is to evaluate the incremental benefit or the value  
01:35:29 3 that's provided by the patented claims.

01:35:32 4 And so, first, the first opinion I have is in --  
01:35:35 5 is that Mr. Weinstein, I believe, has failed to do that.

01:35:38 6 I think, as he testified to on Tuesday, much of  
01:35:47 7 his analysis is based upon the fraud and fraud prevention  
01:35:49 8 value. But as he testified later, the fraud and fraud  
01:35:54 9 prevention elements aren't in the claims of the patent.

01:35:55 10 And so, second, I'll walk you through my analysis  
01:35:59 11 of what I did and -- and how I believe that if the patents  
01:36:02 12 are found to be valid and infringed, that the damage amount  
01:36:05 13 in this case is -- is, based upon my calculation, is  
01:36:08 14 \$3.98 million.

01:36:09 15 Q. You mentioned that you were in court and have been here  
01:36:20 16 for all of the testimony since opening statements. Were  
01:36:23 17 you here for Mr. Weinstein's testimony?

01:36:26 18 A. Yes, ma'am.

01:36:26 19 Q. And during Mr. Weinstein's testimony, did you confirm  
01:36:29 20 that there were things that you and Mr. Weinstein agree on?

01:36:33 21 A. Yes.

01:36:33 22 Q. Will you please -- can you give us an example of what  
01:36:38 23 you agree on?

01:36:39 24 A. Sure. So, again, in -- in the context of doing this  
01:36:44 25 damage analysis, Mr. Weinstein I think did a good job of

01:36:48 1 presenting this hypothetical negotiation that we have to go  
01:36:49 2 through. We have to go back and put together what the  
01:36:53 3 parties would have negotiated at the time of first  
01:36:56 4 infringement or at the time of the hypothetical  
01:37:02 5 negotiation.

01:37:02 6           We both agree that a reasonable royalty is an  
01:37:04 7 appropriate measure of damage. We both agree that the  
01:37:08 8 hypothetical negotiation and the assumptions behind that  
01:37:10 9 negotiation would have occurred in July of 2018. We both  
01:37:15 10 agree that the damages periods of when damages began to  
01:37:19 11 accrue or when they began to start would be August 17th of  
01:37:24 12 2018, and we've measured damages through today through the  
01:37:26 13 end of trial.

01:37:27 14           There's case law out there called Georgia-Pacific  
01:37:31 15 that lists a bunch of factors that experts in our field use  
01:37:34 16 to kind of evaluate the hypothetical negotiation. We both  
01:37:40 17 agree that a commercially viable non-infringing alternative  
01:37:43 18 would provide a cap to a royalty, and I'll explain that  
01:37:46 19 later.

01:37:46 20           THE COURT: Mr. Gerardi, would you slow down,  
01:37:49 21 please?

01:37:49 22           THE WITNESS: Yes, I'm sorry, Your Honor.

01:37:51 23           THE COURT: Just take it a little slower.

01:37:53 24 A. And then the other thing that we agree on, again, is  
01:37:53 25 our job is to measure the incremental value provided by the

01:37:57 1 claims of the patent. What are the claims that we're asked  
01:38:00 2 to evaluate? Because that's really what's at issue in the  
01:38:02 3 matter.

01:38:04 4 Q. So just so I understand, you and Mr. Weinstein agree  
01:38:07 5 that you value the incremental contribution associated with  
01:38:11 6 the patent?

01:38:11 7 A. Yes, ma'am.

01:38:12 8 Q. And you're supposed to value what's new about the  
01:38:16 9 patent that didn't exist before?

01:38:18 10 A. Yes, ma'am.

01:38:21 11 Q. Now, do you have any areas of disagreement with  
01:38:24 12 Mr. Weinstein?

01:38:24 13 A. Yes, I do.

01:38:25 14 Q. Can you just describe what those are to the jury,  
01:38:29 15 please?

01:38:29 16 A. Sure. And, again, as Mr. Weinstein testified the other  
01:38:35 17 day at trial, his analyses are based upon valuing the fraud  
01:38:40 18 detection and fraud prevention elements, and those are the  
01:38:43 19 bases of his calculations. But as he testified to, on  
01:38:48 20 Tuesday, those fraud prevention and fraud detection  
01:38:53 21 elements aren't in the claims of the patents, so I think he  
01:38:57 22 was valuing the wrong thing essentially.

01:38:59 23 Q. Were you here yesterday for Mr. Hecht's testimony?

01:39:01 24 A. Yes, ma'am.

01:39:02 25 Q. Did you hear counsel for USAA suggest that

01:39:06 1 Mr. Weinstein has two damages theories, one based on cost  
01:39:10 2 savings and one based on fraud prevention value?  
01:39:12 3 A. I heard that.  
01:39:13 4 Q. Do you agree with that?  
01:39:15 5 A. No, not at all.  
01:39:16 6 Q. Why don't you agree with that?  
01:39:18 7 A. Because my analyses of both of Mr. Weinstein's opinions  
01:39:23 8 demonstrate that they're measuring the fraud prevention and  
01:39:25 9 fraud detection elements; they're not measuring the claims  
01:39:29 10 of the patents.  
01:39:30 11 Q. So -- so the cost savings model, is that based on the  
01:39:38 12 fraud prevention value, as well?  
01:39:40 13 A. It's based upon the fraud prevention, that is titled  
01:39:46 14 ATM measurement of the patented claims of fraud prevention.  
01:39:49 15 So, again, it's not based upon a cost savings analysis.  
01:39:52 16 Q. And -- and what is your understanding about whether the  
01:40:02 17 fraud prevention -- fraud prevention features are in the  
01:40:08 18 claims from Mr. Weinstein's testimony?  
01:40:11 19 A. My understanding is that they're not, and I think on  
01:40:14 20 testimony, he -- he confirmed that they're not.  
01:40:17 21 Q. All right. Let's turn to your opinion that the measure  
01:40:24 22 of damages in this case is -- is \$3.98 million.  
01:40:29 23 All right. So before we go into the details of  
01:40:32 24 your opinion, will you describe for us what your -- just a  
01:40:36 25 high level overview of what your opinion is?

01:40:38 1 A. Sure. So, again, three things. The first is based  
01:40:42 2 upon the calculation that I'll walk you through. The  
01:40:46 3 damages I believe are 3.98 million. I believe Wells Fargo  
01:40:50 4 could have used a non-infringing alternative that cost less  
01:40:54 5 than that amount, which would essentially set a cap on the  
01:40:58 6 royalty rate. And as we've heard, there are no licenses to  
01:41:02 7 the patents in this suit.

01:41:04 8 Q. Did you conduct a hypothetical negotiation like  
01:41:08 9 Mr. Weinstein did?

01:41:09 10 A. Yes, I did.

01:41:09 11 Q. And what do we have here on -- on this screen?

01:41:17 12 A. Just to summarize, again, the facts that -- that we  
01:41:21 13 talked and that Mr. Weinstein, again, I think alluded to.  
01:41:25 14 We're having this discussion in -- in June -- in July of  
01:41:28 15 2018. The ground rules -- we both agree that the  
01:41:34 16 patents -- for our purposes of evaluating damages, we have  
01:41:37 17 to assume that the patents are valid and enforceable and  
01:41:40 18 that both parties want to have an agreement.

01:41:42 19 We both -- these Georgia-Pacific factors, there's  
01:41:46 20 15 of them. I put them into these four categories just  
01:41:50 21 because I think they make more logical sense to evaluate.

01:41:54 22 Q. Mr. Gerardi, let me interrupt you right there. So --  
01:41:57 23 so you've grouped the Georgia-Pacific factors into these  
01:42:01 24 categories. So you've -- you've walked us through the --  
01:42:03 25 through the ground rules, and you and Mr. Weinstein agree

01:42:05 1 on the ground rules, correct?

01:42:07 2 A. Yes, ma'am.

01:42:07 3 Q. All right. And so the first category you have is

01:42:09 4 licensing. So what are the licensing factors for the --

01:42:13 5 for the analysis that you performed?

01:42:14 6 A. Well, again, you look to see if there are -- there are

01:42:17 7 licenses for the patents-in-suit. You'd look to see if

01:42:22 8 there are established licenses out there. You look to see

01:42:26 9 the duration of those licenses and those types of things.

01:42:29 10 Q. And what is the second category you have here?

01:42:31 11 A. Nature and use. So, again, you're looking at the

01:42:33 12 utility and the advantages of the patents. What are the

01:42:37 13 claims actually saying that they provide in the -- in the

01:42:40 14 patent. And then the benefits of those use, the nature and

01:42:46 15 extent of those -- of those users.

01:42:47 16 Q. The next category that you've broken out is market

01:42:52 17 competition. What do you mean by that?

01:42:53 18 A. Again, who are the parties, what's the nature of the

01:42:56 19 competition or the nature of the relationship between the

01:42:57 20 parties, and, again, the -- their willingness to enter into

01:43:02 21 these negotiations.

01:43:02 22 Q. And the fourth category you have is commercial success.

01:43:06 23 What do you mean by that?

01:43:08 24 A. What's the economic -- what's the success of a product,

01:43:12 25 what's the profits of the product, and then, most

01:43:15 1 importantly, what's the apportioned profits. So what are  
01:43:18 2 the -- what's the portion of profits that's directly  
01:43:21 3 attributable to the claims of the patent as opposed to the  
01:43:24 4 other intellectual property or other technology that's used  
01:43:27 5 to sell and deliver that product.

01:43:30 6 Q. Did you use all four of these categories in performing  
01:43:34 7 your analysis in this case?

01:43:35 8 A. Yes, I considered all of them.

01:43:38 9 Q. Okay. And how did you go about determining what the  
01:43:45 10 compensation would be under your analysis?

01:43:47 11 A. Well, I think there's -- I'll say valuation and three  
01:43:51 12 easy steps. The first thing --

01:43:53 13 Q. All right. What is the first step?

01:43:55 14 A. We're talking about MRDC, so -- so -- so check  
01:43:59 15 account -- checking information, getting checks into the  
01:44:02 16 system. So I started with the profits from the checking  
01:44:05 17 account customers who use mobile banking.

01:44:08 18 Q. And then what was the second step?

01:44:09 19 A. The second step was to determine how much of that  
01:44:13 20 overall profit comes from mobile banking.

01:44:15 21 Q. And then what's the third step?

01:44:18 22 A. How much of the general mobile banking profit comes  
01:44:23 23 from this specific area called MRDC, mobile remote deposit  
01:44:26 24 capture.

01:44:26 25 Q. All right. So I want to walk through each one of these

01:44:31 1 steps. So let's go to the first step. And tell us what it  
01:44:39 2 is that you're trying to determine in the first step.

01:44:40 3 A. Again, what's the size of the pile we're going to be  
01:44:44 4 talking about. So you're looking at the profitability or  
01:44:46 5 the profits to Wells Fargo from all the customers who --  
01:44:53 6 the MRDC customers, and, again, their checking account  
01:44:57 7 profits -- the checking profits.

01:44:59 8 Q. Why did you select that?

01:45:00 9 A. Again, because MRDC is -- is mobile remote deposit  
01:45:03 10 capture, you're getting checks into the system somehow. So  
01:45:07 11 I'm looking at the profits for checking account customers.

01:45:09 12 Q. All right. And then what is the next step that you  
01:45:12 13 did?

01:45:12 14 A. So, remember, mobile banking, which is more than  
01:45:19 15 MRDC -- the mobile banking is one component of -- of  
01:45:23 16 customers that deal with the bank, so I wanted to separate  
01:45:24 17 out the mobile banking side of the pie from the other  
01:45:30 18 banking activities, such as teller and ATM activities and  
01:45:35 19 things that have nothing to do with mobile banking.

01:45:37 20 Q. All right. So just so I'm clear, mobile deposit is  
01:45:41 21 part of mobile banking; is that -- do I have that right?

01:45:44 22 A. Correct.

01:45:44 23 Q. Okay. And then there's other banking activity that  
01:45:46 24 occurs at the teller and at the ATM that is not related to  
01:45:51 25 mobile deposit?

01:45:51 1 A. Correct.

01:45:52 2 Q. All right. And so that was the second step, to

01:45:55 3 separate out mobile banking from non-mobile banking?

01:46:00 4 A. That's correct.

01:46:01 5 Q. All right. And so what was the third step?

01:46:03 6 A. The third step is to look at mobile banking and seeing

01:46:06 7 all the activities that go within that platform, how much

01:46:11 8 of that has to do with MRDC.

01:46:13 9 Q. So just so I have it clear, are you saying that there's

01:46:16 10 more than just mobile deposit that happens in mobile

01:46:19 11 banking at Wells Fargo?

01:46:20 12 A. Absolutely.

01:46:21 13 Q. Okay. Can you give us some examples of what that

01:46:23 14 includes?

01:46:23 15 A. So in mobile banking, you can go on and you can check

01:46:26 16 your balances, you can pay bills, you could transfer money,

01:46:30 17 you could send some texts, you could do a lot of different

01:46:36 18 things on there that have nothing to do with mobile remote

01:46:37 19 deposit capture.

01:46:37 20 Q. Okay. Does the analysis end here?

01:46:40 21 A. No, ma'am.

01:46:41 22 Q. Okay. Well, then, what's the next step?

01:46:45 23 A. So MRDC -- and I think Mr. Hecht described this

01:46:48 24 yesterday. There's a lot of other things that go in to

01:46:51 25 process that item. So once the image is taken and

01:46:55 1 introduced into the system, there's a lot of other things  
01:46:57 2 that happen.

01:46:58 3                 The last step that I performed is to say how much  
01:47:01 4 of those steps -- how much of that profit was coming from  
01:47:03 5 the patents as opposed to all the other things that were  
01:47:06 6 going on within that MRDC processing system.

01:47:11 7 Q. And just so I'm clear, when you refer to MRDC, what  
01:47:14 8 does that stand for?

01:47:15 9 A. Mobile remote deposit capture.

01:47:17 10 Q. And does that refer to Wells Fargo's Mobile Deposit  
01:47:20 11 product?

01:47:20 12 A. Yes, ma'am.

01:47:21 13 Q. Okay. And -- and why is it important as part of your  
01:47:28 14 analysis to evaluate or value the patents in this case?

01:47:32 15 A. Again, the job of my -- of experts is to evaluate  
01:47:38 16 what's the contribution of the patents-in-suit and the  
01:47:40 17 claims that are in the patents as opposed to all the other  
01:47:43 18 things that are going into a product.

01:47:45 19                 And so you need to be able to apportion out or  
01:47:47 20 segment out the contributions in the patented claims. So  
01:47:51 21 what's at issue in this case specifically.

01:47:53 22 Q. What is your understanding of what it is that USAA  
01:47:57 23 is -- is entitled to be compensated for, in the event this  
01:48:01 24 jury finds that the patents are infringed and valid?

01:48:05 25 A. Only the contributions provided to those patents to the

01:48:08 1 overall system.

01:48:10 2 Q. All right. So let's look at the numbers that you  
01:48:14 3 identified that go with each one of these steps.

01:48:17 4 All right. So -- so you've got an illustration  
01:48:22 5 here on the screen. And so where -- where should we start  
01:48:27 6 in understanding where you started your analysis?

01:48:29 7 A. So this example is for the full year of 2018. Now, we  
01:48:35 8 talked about earlier, the damages began in August of 2018.  
01:48:38 9 So later I'm going to prorate the numbers.

01:48:40 10 Q. What do you -- what do you mean, prorate the numbers?

01:48:43 11 A. Take the full 2018 number and prorate it down to the  
01:48:48 12 period August 17 through December 31st.

01:48:51 13 Q. All right. So what do we see here on the screen as far  
01:48:53 14 as the full year of 2018 before you've divided out January  
01:48:57 15 through --

01:48:58 16 A. So Wells Fargo produced in this case the number of  
01:49:01 17 active customers -- they call it active 30-day customers --  
01:49:06 18 who use MRDC, and that was over a period of months. I  
01:49:10 19 averaged that number. So you have 2.8 million customers  
01:49:13 20 essentially during 2018 who are MRDC customers, who are  
01:49:18 21 actively using the MRDC system.

01:49:20 22 THE COURT: Counsel, approach the bench, please.

01:49:23 23 (Bench conference.)

01:49:31 24 THE COURT: Ms. Williams, is it my understanding  
01:49:33 25 that after Mr. Gerardi steps down, that the Defendant has

01:49:36 1 something like 13 minutes of deposition testimony to play?

01:49:39 2 MS. WILLIAMS: Yes, Your Honor, to the extent that

01:49:40 3 we have time, and it might be a good time for me to ask --

01:49:44 4 THE COURT: You have 30 minutes now. That's --

01:49:44 5 MS. WILLIAMS: Yes, Your Honor.

01:49:46 6 THE COURT: -- why you're up here, so I can make

01:49:49 7 sure you know.

01:49:50 8 MS. WILLIAMS: Thank you. I appreciate that.

01:49:50 9 THE COURT: And if you need to take that into

01:49:52 10 account.

01:49:53 11 You have plenty of time, Mr. Sheasby.

01:49:59 12 MR. SHEASBY: I'm going to give some back.

01:49:59 13 THE COURT: That will be welcome.

01:49:59 14 All right. Let's proceed.

01:50:01 15 MS. WILLIAMS: Yes. Thank you, Your Honor.

01:50:08 16 (Bench conference concluded.)

01:50:08 17 THE COURT: All right. Let's proceed.

01:50:08 18 MS. WILLIAMS: Thank you.

01:50:10 19 Q. (By Ms. Williams) All right. Mr. Gerardi, so you've

01:50:13 20 identified the MRDC customers, and then what did you do

01:50:15 21 next for this first step?

01:50:17 22 A. The second step was to identify the profits that --

01:50:21 23 that income that Wells Fargo receives from its checking

01:50:24 24 account customers.

01:50:25 25 Q. Why did you use that?

01:50:27 1 A. So, again, you want to understand the profitability  
01:50:30 2 overall for those banking customers, and so using that  
01:50:34 3 times the number of MRDC customers, I'm able to determine  
01:50:37 4 on a pre-tax basis the -- that -- the size of the pie that  
01:50:41 5 ultimately needs to be apportioned down.

01:50:43 6 And so multiplying those two together, I came up  
01:50:48 7 with \$339.2 million of total profits for customers who use  
01:50:55 8 banking activities -- mobile deposit customers who use  
01:50:59 9 checking accounts at Wells Fargo.

01:51:00 10 Q. So why did you use checking accounts?

01:51:03 11 A. So, again, MRDC is having to do with depositing checks  
01:51:10 12 into the banking system. I didn't look at the mortgages or  
01:51:14 13 their loans or auto loans or anything like that because  
01:51:18 14 that has no direct connection to the -- to the -- to the  
01:51:21 15 MRDC activities we're talking about here.

01:51:23 16 Q. And after you identified the customers and identified  
01:51:27 17 the pre-tax profits, did you -- what did your calculation  
01:51:34 18 total?

01:51:34 19 A. \$339.2 million, again, for the full year of 2018.

01:51:39 20 Q. And what does that number represent?

01:51:40 21 A. Again, those are the total net income to the bank for  
01:51:47 22 all of the MRDC customers who have checking account  
01:51:48 23 activity.

01:51:48 24 Q. Okay. Did you end your analysis there?

01:51:52 25 A. No, ma'am.

01:51:52 1 Q. What was your next step?

01:51:53 2 A. So the next step was to say, okay, how much of that pie

01:51:57 3 are we going to break out into that thing we talked about,

01:52:02 4 which is mobile -- mobile banking.

01:52:04 5 Q. All right. And so did you -- does this slide here

01:52:12 6 illustrate how you did that calculation?

01:52:14 7 A. It does.

01:52:15 8 Q. Okay. Will you walk us through what we're seeing here

01:52:17 9 for your calculation?

01:52:18 10 A. Sure. So I call this my first apportionment factor.

01:52:22 11 So of the total pie, I want to figure out how much of it is

01:52:25 12 coming from mobile banking activities. And to do that, I

01:52:30 13 identified the mobile deposit and money movement

01:52:36 14 transactions, basically everything that's happening on your

01:52:38 15 mobile app. And I segmented that from the non-mobile

01:52:43 16 banking activity. So all the activity that's happening

01:52:46 17 with the teller transactions or ATM transactions or all the

01:52:49 18 things -- the paper activity that's going on.

01:52:51 19 And as you can see here, the mobile deposit and

01:52:56 20 money movement transactions, I'm at about 32.7 percent of

01:53:01 21 the total amount of activity in 2018.

01:53:02 22 And so I took that number and applied it to the

01:53:07 23 checking account profits we just mentioned, to get my first

01:53:11 24 apportionment factor.

01:53:12 25 Q. How did you go about determining the mobile deposit and

01:53:16 1 money movement transaction numbers that you -- that you  
01:53:23 2 have here on the screen?

01:53:24 3 A. So, again, Wells Fargo produced to us activities, both  
01:53:32 4 for the teller transactions, for the ATM transactions, and  
01:53:35 5 all their mobile banking activities, and we aggregated that  
01:53:39 6 information into spreadsheets and performed these various  
01:53:42 7 calculations.

01:53:43 8 Q. And so the information that you relied on was Wells  
01:53:46 9 Fargo's information?

01:53:47 10 A. Yes, ma'am.

01:53:47 11 Q. Okay. And so what did you do next -- actually let me  
01:53:52 12 ask you this question. Let me back up.

01:53:54 13 When you applied the first apportionment factor,  
01:53:57 14 what did you arrive at?

01:53:59 15 A. So I took that 32.27 percent that I just mentioned to  
01:54:03 16 you, multiplied it by the 339 million, and that results --  
01:54:09 17 profits from mobile banking of \$110.8 million  
01:54:14 18 approximately. So that was my first step to kind of break  
01:54:17 19 that pie apart.

01:54:18 20 Q. So your first step was to isolate the mobile banking  
01:54:23 21 profits?

01:54:23 22 A. Yes, ma'am.

01:54:24 23 Q. Okay. And so I -- did you go on to the second  
01:54:28 24 apportionment factor?

01:54:29 25 A. Yes.

01:54:29 1 Q. Okay. What was that?

01:54:30 2 A. So the next step is -- and we talked about this.

01:54:34 3 Mobile banking has a lot of activity that's going on. And

01:54:37 4 so if I look within the mobile banking platform, there is

01:54:41 5 these things called money movement counts.

01:54:44 6 And so if you look at the mobile banking platform,

01:54:48 7 there's things such as bill payments, M -- M2M transfers,

01:54:57 8 so you may be transferring money from your checking account

01:54:58 9 to your savings account or from your savings account to

01:55:01 10 your money market account or your savings account to

01:55:01 11 checking. So I segmented out all the money movement counts

01:55:06 12 that occurred within that -- the mobile banking platform.

01:55:09 13 Q. And let me just stop you right there. So this -- this

01:55:13 14 money movement with the M2M, the P2P, and the -- and the

01:55:21 15 bill payments, these kinds that are described here on the

01:55:25 16 screen as far as your second apportionment factor, those

01:55:29 17 don't involve depositing a check?

01:55:32 18 A. No, ma'am. What involves depositing a check is the --

01:55:36 19 is the number of checks scanned, which is right here.

01:55:37 20 Q. Okay. And so how did you go about excluding the money

01:55:40 21 movement accounts -- or isolating the mobile deposit

01:55:42 22 counts?

01:55:44 23 A. So, again, looking at all the activity that occurs

01:55:47 24 within the mobile banking platform, I looked at the total

01:55:51 25 number of -- of MRDC checks that were deposited, and that's

01:55:55 1 our number here, 80.6 million units, relative to all the  
01:56:00 2 other things that were happening within the mobile banking  
01:56:02 3 platform, and determined that that was 14.7 percent of the  
01:56:05 4 total.

01:56:08 5 Q. Okay. And what did you -- how did you use the  
01:56:11 6 14.7 percent?

01:56:13 7 A. So if we go back to the -- to the schedule we were  
01:56:17 8 looking at previously, I took the \$110 million --  
01:56:24 9 110.8 million that we were -- I had calculated for my first  
01:56:28 10 apportionment factor, applied that 14.7 million --  
01:56:31 11 14.7 percent attributed to mobile deposit, and came up with  
01:56:37 12 \$16.3 million of profit that's attributable to -- to mobile  
01:56:42 13 deposit as a whole.

01:56:43 14 And, again, there's more that goes on within  
01:56:46 15 mobile deposit that's beyond the patents-in-suit, but  
01:56:49 16 that's my next starting point.

01:56:50 17 Q. All right. Well, so let's go to your next starting  
01:56:54 18 point, and so is this the third apportionment factor?

01:56:58 19 A. Yes, it is.

01:56:58 20 Q. Okay. So describe what we're seeing here on the screen  
01:57:02 21 related to the third apportionment factor from DTX-230?

01:57:08 22 A. Sure. So you may recall Mr. Hecht had described that  
01:57:11 23 front end platform -- or front end systems and the back end  
01:57:14 24 systems. And if you can see here, probably it's a little  
01:57:18 25 small, those are those four back end systems that Mr. Hecht

01:57:21 1 had talked about that had been in existence for many, many  
01:57:26 2 years prior to the patents. In some cases decades prior.

01:57:29 3 And he mentions the funnel into funnel concept.

01:57:36 4 You have all these different sources of images coming into  
01:57:39 5 the bank. One of those sources now is MRDC.

01:57:42 6 And so if I look at what was pre-existing with  
01:57:46 7 those systems there, the back end system, and I look at the  
01:57:49 8 introduction of this new MRDC element, I look at that,  
01:57:53 9 there's five components to that, and so I looked at it on a  
01:57:57 10 mathematical basis and said one-fifth, 20 percent.

01:58:03 11 Mr. Hecht also confirmed yesterday that the  
01:58:05 12 majority of the activity occurs on that back end. About 80  
01:58:08 13 percent of the activity to process an item occurs on that  
01:58:11 14 back end. So, again, 20 percent corresponds to what I have  
01:58:15 15 done in terms of my third apportionment factor.

01:58:17 16 Q. So let me be clear. The 20 percent contribution of the  
01:58:25 17 patents as a percentage of mobile deposit, you relied on  
01:58:29 18 Wells Fargo's own documents as well as your conversations  
01:58:31 19 with Mr. Hecht?

01:58:32 20 A. Yes.

01:58:33 21 Q. And you heard Mr. Hecht's testimony yesterday. Was  
01:58:37 22 there anything else in his testimony yesterday that -- that  
01:58:40 23 confirms the 20 percent number to you?

01:58:44 24 A. Yes.

01:58:44 25 Q. What is that?

01:58:45 1 A. He mentions in terms of the dollar spend, the order of  
01:58:49 2 magnitude that Wells Fargo has invested in those front end  
01:58:52 3 and back end systems, that Wells Fargo has invested  
01:58:56 4 significantly more in those back end systems, again, about  
01:58:59 5 80 percent of the back end systems, as opposed to the  
01:59:02 6 dollar spend on those front end systems.

01:59:04 7 Q. Mr. Gerardi, what is your conclusion regarding Wells  
01:59:09 8 Fargo's 2018 profits attributable to the patents-in-suit?

01:59:13 9 A. Well, so, again, I mentioned previously, this is for  
01:59:16 10 all of 2018. The damages in this case don't begin until  
01:59:20 11 August 17th of this year. So I had to prorate these  
01:59:24 12 numbers down.

01:59:26 13 And so August 17th through December 31st is 137  
01:59:30 14 days, which, again, 37.5 percent of the total, so I  
01:59:36 15 multiplied the 3.2 million by the 37.5 percent to say for  
01:59:41 16 this year for the damages period, \$1.22 million are  
01:59:47 17 attributable to the patents-in-suit in this case.

01:59:49 18 Q. And that -- that's for the partial year for 2018?

01:59:51 19 A. Correct.

01:59:52 20 Q. Okay. And then what about for 2019?

01:59:55 21 A. I performed the same analyses for 2019, and again I  
02:00:01 22 estimated for 2020. So for 2019, the number would be \$2.7  
02:00:07 23 million, and for 2020, for the first six days of this year,  
02:00:12 24 it would be \$44,000.

02:00:13 25 Q. And so if we add all of these up together, what is your

02:00:16 1 opinion about the total profit attributable to the patents?

02:00:21 2 A. For the period August 27th, 2018, through January 6th,  
02:00:26 3 2020, it would be \$3.98 million.

02:00:29 4 Q. And so in arriving at your -- and is this your opinion  
02:00:32 5 about the damages in this case?

02:00:35 6 A. Yes, ma'am.

02:00:35 7 Q. Okay. And in arriving at this \$3.98 million damages  
02:00:40 8 figure, in the event the jury finds that the patents are  
02:00:43 9 infringed and not invalid, was there anything else that you  
02:00:47 10 considered in arriving at this opinion?

02:00:49 11 A. Yes.

02:00:50 12 Q. What -- what was that?

02:00:52 13 A. It would be the non-infringing alternative that  
02:00:55 14 Dr. Villasenor had discussed previously.

02:00:58 15 Q. Okay. And how does the non-infringing alternative that  
02:01:02 16 Dr. Villasenor talked about earlier today impact your  
02:01:04 17 opinion in this case?

02:01:05 18 A. So if you think about this hypothetical negotiation, if  
02:01:10 19 there's an alternative out there that costs less to  
02:01:14 20 implement than some other measure, that's going to set the  
02:01:17 21 cap.

02:01:18 22 So, for example, if USAA is asking for, you know,  
02:01:22 23 something here and your non-infringing alternative is  
02:01:26 24 something less than that, you're not going to license --  
02:01:29 25 you're not going to agree to a license for more than it

02:01:33 1 costs to implement that non-infringing alternative.

02:01:35 2 So what I looked at here is the \$3.98 million that  
02:01:39 3 I came up with is the cap. That's the most, I believe,  
02:01:41 4 that Wells Fargo will be willing to pay at the hypothetical  
02:01:46 5 negotiation. Again, because that cap or that  
02:01:48 6 non-infringing alternative that Dr. Villasenor identified  
02:01:51 7 would be less than that amount.

02:01:56 8 Q. Mr. Gerardi, was there anything else that you  
02:01:58 9 considered in arriving at your conclusion that Wells Fargo  
02:02:01 10 would pay no more than \$3.98 million in a lump sum?

02:02:06 11 A. Well, again, that and the fact that USAA has not  
02:02:09 12 licensed the patents -- has not received licenses to the  
02:02:13 13 patents.

02:02:13 14 Q. All right. So based on your -- your review of the --  
02:02:18 15 of the documents and the information and your  
02:02:22 16 conversations, what is your conclusion in this case about  
02:02:24 17 the damages Wells Fargo would pay should the jury determine  
02:02:28 18 that the patents are infringed and -- and valid?

02:02:32 19 A. That a lump-sum license would be \$3.98 million for the  
02:02:41 20 intellectual property for the claims of the patents at  
02:02:43 21 issue.

02:02:43 22 Q. And what if the jury finds that the patents in this  
02:02:45 23 case are not infringed, what is the -- what are the -- what  
02:02:49 24 is the appropriate amount of damages in this case?

02:02:51 25 A. That would be zero dollars.

02:02:53 1 Q. And what if the jury finds that the patents in this  
02:02:56 2 case are invalid, what is the appropriate amount of damages  
02:03:00 3 in this case?

02:03:00 4 A. Zero dollars.

02:03:02 5 MS. WILLIAMS: Your Honor, may I have a moment to  
02:03:04 6 confer with counsel?

02:03:06 7 THE COURT: You may.

02:03:16 8 MS. WILLIAMS: Your Honor, I pass the witness.

02:03:17 9 THE COURT: All right. Cross-examination by the  
02:03:19 10 Plaintiff.

02:03:21 11 MR. SHEASBY: Your Honor, I'm going to have to  
02:03:22 12 hand out binders.

02:03:25 13 THE COURT: Let's go ahead and do that then. If  
02:03:31 14 you need some help, there are plenty of people at your  
02:03:34 15 table.

02:04:27 16 Counsel, before we proceed with cross-examination,  
02:04:29 17 go ahead and finish handing out what you need to, but  
02:04:34 18 before we proceed with cross-examination, we're going to  
02:04:36 19 take a short recess, and then we'll begin cross-examination  
02:04:40 20 of this witness as soon as recess is complete.

02:04:40 21 Ladies and gentlemen of the jury, simply close  
02:04:41 22 your notebooks and leave them there in your chairs, follow  
02:04:45 23 all my instructions, and we'll have you back in here  
02:04:47 24 shortly to continue. Don't discuss the case among  
02:04:51 25 yourselves.

02:04:51 1 The jury is excused for recess.

02:04:53 2 COURT SECURITY OFFICER: All rise.

02:04:55 3 (Jury out.)

02:04:56 4 THE COURT: Counsel, just for your purposes, the

02:05:17 5 Court's timekeeping indicates the Plaintiff has a total of

02:05:23 6 two hours and 23 minutes remaining.

02:05:25 7 The Defendant has 15 minutes remaining.

02:05:27 8 The Court stands in recess.

02:05:29 9 COURT SECURITY OFFICER: All rise.

02:32:43 10 (Recess.)

02:32:48 11 (Jury out.)

02:32:49 12 COURT SECURITY OFFICER: All rise.

02:32:50 13 THE COURT: Please be seated.

02:34:52 14 Are you ready to proceed with cross-examination,

02:34:57 15 Mr. Sheasby?

02:34:58 16 MR. SHEASBY: Yes, Your Honor.

02:34:58 17 THE COURT: All right. You may go to the podium.

02:35:00 18 Let's bring in the jury, please, Ms. Denton.

02:35:04 19 COURT SECURITY OFFICER: All rise.

02:35:04 20 (Jury in.)

02:35:27 21 THE COURT: Please be seated.

02:35:28 22 All right. We'll proceed with cross-examination

02:35:33 23 of Mr. Gerardi by Plaintiff's counsel, Mr. Sheasby.

02:35:37 24 You may proceed.

02:35:37 25 CROSS-EXAMINATION

02:35:38 1 BY MR. SHEASBY:

02:35:38 2 Q. Good afternoon, Mr. Gerardi.

02:35:41 3 A. Good afternoon.

02:35:41 4 Q. We've met before.

02:35:43 5 A. Yes, we have.

02:35:45 6 Q. It's nice to see you again.

02:35:46 7 A. Thank you.

02:35:46 8 Q. Mr. Gerardi, when Apple introduced the iPhone, it was

02:35:58 9 disruptive, fair?

02:35:59 10 A. Generally speaking, I think that's a fair statement.

02:36:02 11 Q. And Apple is now one of the most valuable companies in

02:36:05 12 the world, fair?

02:36:06 13 A. Yes.

02:36:06 14 Q. When Google introduced its search engine, that was

02:36:13 15 disruptive, as well, correct?

02:36:17 16 A. It was popular. I just don't know where it was

02:36:21 17 relative to other search engines.

02:36:23 18 Q. You don't know if Google's search program was

02:36:26 19 disruptive, correct?

02:36:27 20 A. At the time. I know it is as of today.

02:36:30 21 Q. Today Google's search engine is disruptive, fair?

02:36:34 22 A. Fair.

02:36:35 23 Q. Google is also one of the most valuable companies in

02:36:38 24 the world, fair?

02:36:38 25 A. Fair.

02:36:39 1 Q. As an economist, one of the things you absolutely need  
02:36:44 2 to do when valuing a technology is consider whether it's  
02:36:50 3 disruptive, fair?

02:36:51 4 A. You value the technology and the components of the  
02:36:59 5 technology and see how that plays into the overall product  
02:37:02 6 itself.

02:37:02 7 Q. As an economist, we should consider whether a  
02:37:06 8 technology is disruptive, correct?

02:37:09 9 A. When you say a technology, a technology could be one of  
02:37:13 10 many pieces of technology that contribute to an overall  
02:37:16 11 product.

02:37:17 12 Q. Can you answer the question as to whether an economist  
02:37:20 13 should consider whether technology is disruptive?

02:37:22 14 A. And, again, when you say "the technology" -- what do  
02:37:27 15 you mean when you say "the technology"?

02:37:29 16 MR. SHEASBY: Your Honor, I object,  
02:37:31 17 non-responsive.

02:37:34 18 THE COURT: Restate the question.

02:37:36 19 Q. (By Mr. Sheasby) Mr. Saffici [sic], if a patented  
02:37:40 20 technology --

02:37:41 21 THE COURT: This is Mr. Gerardi.

02:37:42 22 Q. (By Mr. Sheasby) Mr. Gerardi, if a patented technology  
02:37:45 23 is disruptive, that's something an economist should  
02:37:48 24 consider, fair?

02:37:50 25 A. In the context of valuation, yes, that's fair.

02:37:54 1 Q. Now, I noticed that in your presentation, you didn't  
02:38:02 2 show the jury any documents from Wells Fargo, fair?  
02:38:05 3 A. I showed extracts of documents that came from Wells  
02:38:08 4 Fargo.  
02:38:08 5 Q. You didn't show any actual documents from Wells Fargo,  
02:38:11 6 correct?  
02:38:11 7 A. That's fair.  
02:38:14 8 Q. You didn't show any third-party analysis about mobile  
02:38:19 9 remote deposit capture, correct?  
02:38:19 10 A. Correct.  
02:38:19 11 Q. And you didn't discuss the fact that --  
02:38:24 12 MR. SHEASBY: Let's have Weinstein Demonstrative  
02:38:30 13 4.15, please. Go back one slide. No, pull that down --  
02:39:09 14 pull that down, Mr. Huynh. That's the wrong --  
02:39:10 15 Your Honor, may I have a moment, please?  
02:39:12 16 THE COURT: You may have a moment.  
02:39:14 17 MR. SHEASBY: Thank you.  
02:39:39 18 MS. WILLIAMS: Your Honor, may we approach?  
02:39:41 19 THE COURT: You may approach.  
02:39:43 20 (Bench conference.)  
02:39:48 21 MS. WILLIAMS: Your Honor, I believe they just  
02:39:50 22 showed a demonstrative from the first case, and we'd object  
02:39:52 23 to that. I mean, that -- that this demonstrative has not  
02:39:56 24 been shown in this case.  
02:39:57 25 MR. SHEASBY: Yes. Yes, we completely agree. It

02:40:02 1 was absolutely a mistake, which is why I had him pull it  
02:40:03 2 down immediately.

02:40:04 3 THE COURT: All right. And you haven't -- you  
02:40:05 4 haven't asked any questions about it?

02:40:06 5 MR. SHEASBY: Absolutely not.

02:40:07 6 MS. WILLIAMS: We ask that the jury be instructed  
02:40:11 7 to disregard what was just displayed on the screen.

02:40:14 8 THE COURT: I mean, we're talking about a second  
02:40:16 9 or less that it was on the screen?

02:40:18 10 MS. WILLIAMS: Your Honor --

02:40:18 11 THE COURT: That's fine. I'll tell them to ignore  
02:40:20 12 what they just saw or didn't see.

02:40:22 13 MS. WILLIAMS: Thank you, Your Honor.

02:40:23 14 THE COURT: All right. Let's proceed.

02:40:23 15 (Bench conference concluded.)

02:40:23 16 THE COURT: Ladies and gentlemen, there was a  
02:40:24 17 slide that very, very momentarily flashed on the screen. I  
02:40:28 18 don't know if you saw it or not. If you did see it, ignore  
02:40:34 19 it. It shouldn't have been shown to you.

02:40:35 20 Let's proceed.

02:40:40 21 Q. (By Mr. Sheasby) Were you in the courtroom for  
02:40:42 22 Mr. Weinstein's testimony?

02:40:47 23 A. Yes, I was.

02:40:48 24 Q. And he showed a demonstrative of -- from Celent,  
02:41:00 25 correct?

02:41:00 1 A. Yes, I believe so.

02:41:02 2 Q. And Celent is an industry analytics company, correct?

02:41:07 3 A. I believe so.

02:41:07 4 Q. And Celent wrote an article about USAA's MRDC system,

02:41:12 5 correct?

02:41:12 6 A. I don't recall specifically what was on the screen.

02:41:14 7 Q. Well, why don't we pull that up. So this was

02:41:39 8 Mr. Weinstein's demonstrative, correct?

02:41:40 9 A. Yes, I believe it was.

02:41:41 10 Q. It's on USAA's mobile remote deposit capture

02:41:45 11 initiative, correct?

02:41:45 12 A. Yes, it is.

02:41:46 13 Q. It calls mobile RDC disruptive, correct?

02:41:52 14 A. That's what it states, yes.

02:41:54 15 Q. It calls it a compelling competitive advantage,

02:41:58 16 correct?

02:41:58 17 A. Yes, it does.

02:42:10 18 Q. You didn't engage at all with Mr. Weinstein's

02:42:16 19 presentation of independent third-party documentation

02:42:19 20 describing USAA's mobile remote deposit capture as

02:42:23 21 disruptive or bleeding edge or compelling competitive

02:42:29 22 advantage, you didn't discuss it at all in your direct

02:42:32 23 examination, fair?

02:42:33 24 A. That's fair.

02:42:33 25 Q. And so have you heard of the concept of an independent

02:42:41 1 third party?

02:42:42 2 A. Generally, yes.

02:42:48 3 Q. So, for example, although you're an expert not employed

02:42:52 4 by Wells Fargo, you've been paid a substantial amount of

02:42:56 5 money by Wells Fargo over the last couple of years, fair?

02:42:57 6 A. My firm has been paid for the services we provide,

02:43:01 7 that's fair.

02:43:01 8 Q. Your rate is \$750.00 an hour, correct?

02:43:03 9 A. 725.

02:43:04 10 Q. You had a team of technologists or you had a team of --

02:43:09 11 of junior folks working with you, correct?

02:43:10 12 A. Yes, that's fair.

02:43:11 13 Q. Over the entire time over the last couple of years

02:43:14 14 you've been working for Wells Fargo, your company has

02:43:18 15 billed hundreds of thousands of dollars to Wells Fargo,

02:43:21 16 correct?

02:43:21 17 A. On this matter, I would say approximately \$200,000.00,

02:43:24 18 that's fair.

02:43:24 19 Q. And can you tell me how much you've been paid by Wells

02:43:28 20 Fargo over the last three years, collectively?

02:43:31 21 MS. WILLIAMS: Objection, Your Honor. Can we

02:43:32 22 approach?

02:43:33 23 THE COURT: Approach the bench.

02:43:35 24 (Bench conference.)

02:43:40 25 MS. WILLIAMS: Mr. Sheasby's question is asking

02:43:42 1 him to get into the work that he did on an -- on the  
02:43:45 2 Case 1, and that is improper.

02:43:49 3 THE COURT: I thought -- maybe I misheard, but I  
02:43:51 4 thought the question was about how much money he'd been  
02:43:53 5 paid for the work done.

02:43:55 6 MS. WILLIAMS: He -- The question was how much has  
02:43:57 7 he been paid in the last three years, which would encompass  
02:44:02 8 Case 1. And so that is highly inappropriate. If he --  
02:44:04 9 he's asked the question about how much money he's been paid  
02:44:07 10 in this case, and that's the extent to which he should be  
02:44:10 11 asked.

02:44:11 12 THE COURT: If he has an ongoing relationship with  
02:44:13 13 this client -- your client or your law firm, and he's been  
02:44:15 14 paid sizeable amounts of money outside of this case by that  
02:44:20 15 client or that law firm, that's still an appropriate area  
02:44:24 16 of inquiry. He cannot open the door to prior litigation or  
02:44:27 17 what -- what those other tasks for which he was paid might  
02:44:31 18 have been.

02:44:31 19 MS. WILLIAMS: Yes, Your Honor, I understand that.  
02:44:32 20 But I would like the Case 1 to be excluded from that.

02:44:36 21 THE COURT: Well, it's excluded because it's not  
02:44:39 22 mentioned. There's no reason to mention it. But whether  
02:44:42 23 it includes -- whatever the work he did prior to this case,  
02:44:47 24 if it's for your firm or your client and it shows an  
02:44:51 25 existing relationship, that's a fair indication of

02:44:56 1 potential for bias. And he's entitled to show that.

02:44:59 2 MS. WILLIAMS: Yes, Your Honor. But what I want  
02:45:01 3 to be clear is that Mr. Sheasby must exclude from his  
02:45:05 4 question anything that would elicit information about what  
02:45:09 5 he's been paid for all of the USAA litigation because he  
02:45:12 6 was our expert in our first case. And so --

02:45:15 7 THE COURT: I understand -- I understand that,  
02:45:20 8 but...

02:45:21 9 Mr. Sheasby, you can ask a question that queries  
02:45:26 10 the level of experience and relationship between this  
02:45:31 11 witness and either the Winston & Strawn law firm or Wells  
02:45:35 12 Fargo, without any mention of any particular work or cases  
02:45:39 13 or litigation that may have predicated this case.

02:45:43 14 MR. SHEASBY: Right. And to be --

02:45:45 15 THE COURT: But I'm not going to make you do that  
02:45:47 16 and then somehow exercise out whatever was related to  
02:45:49 17 Case 1 that the jury is not aware of, and they're not going  
02:45:53 18 to be aware of.

02:45:54 19 MR. SHEASBY: And to be clear, I'm just going to  
02:45:55 20 ask him what's the total amount of compensation he's  
02:45:58 21 received of Wells Fargo over the last -- from Wells Fargo  
02:45:59 22 over the last three years.

02:46:00 23 THE COURT: That's a fair question.

02:46:02 24 I'm going to overrule your objection.

02:46:04 25 MS. WILLIAMS: Yes, Your Honor.

02:46:05 1 THE COURT: All right.

02:46:06 2 (Bench conference concluded.)

02:46:09 3 THE COURT: Let's proceed.

02:46:12 4 The objection is overruled.

02:46:13 5 Q. (By Mr. Sheasby) Mr. Gerardi, what's the total amount

02:46:15 6 of compensation you've received from Wells Fargo over the

02:46:18 7 last four years? Just give me a number.

02:46:20 8 A. For clarification, do you mean me personally -- or the

02:46:25 9 firm?

02:46:26 10 Q. Your firm, sir.

02:46:27 11 A. I can't say specifically because I -- I moved firms

02:46:31 12 between these matters. So I would think my prior firm,

02:46:38 13 approximately \$350,000.00 or so. But, again, I don't have

02:46:42 14 anything more specific than that.

02:46:44 15 Q. So approximately \$600,000.00 all in? Would that seem

02:46:48 16 to be fair, sir?

02:46:50 17 A. No.

02:46:52 18 Q. You're saying your total compensation -- your company's

02:47:01 19 total compensation from Wells Fargo over the last three to

02:47:02 20 four years, including the company you were at previously

02:47:03 21 and the company you're at now, is approximately

02:47:06 22 \$350,000.00?

02:47:07 23 A. Approximately 350 to 400,000, approximately.

02:47:11 24 Q. And so it would be fair to say that someone who has

02:47:14 25 received -- or a company that's received \$400,000.00 from a

02:47:16 1 client is not truly an independent third party, fair?

02:47:19 2 A. I would disagree -- no, I'd disagree with that.

02:47:23 3 Q. Okay. But we know that someone who hasn't received any

02:47:28 4 money from Wells Fargo is Celent, correct? We can see that

02:47:32 5 on Slide 15 of the Wells -- of Mr. Weinstein's

02:47:36 6 demonstratives, correct? For example, Celent wasn't paid

02:47:43 7 \$400,000.00 by USAA to write that its MRDC technology is

02:47:45 8 disruptive in a compelling, competitive advantage, fair?

02:47:48 9 A. Sir, I have no idea how Celent prepared this and what

02:47:52 10 compensation they received, if anybody -- if anything for

02:47:55 11 that.

02:47:56 12 MR. SHEASBY: Okay. Let's go to Mr. Weinstein's

02:47:58 13 Slide 14.

02:48:00 14 Q. (By Mr. Sheasby) AdAge wasn't paid \$400,000.00 by

02:48:07 15 Wells Fargo to write that USAA represents the bleeding edge

02:48:11 16 of mobile banking technology, fair?

02:48:14 17 A. Again, sir, I have no -- no basis to say how -- how

02:48:16 18 AdAge received compensation and what it did or didn't do.

02:48:20 19 MR. SHEASBY: Let's go to Slide 16.

02:48:22 20 Q. (By Mr. Sheasby) And Apple was not paid \$400,000.00 by

02:48:29 21 USAA to announce that its mobile deposit application was

02:48:32 22 the most popular financial application on the iTunes store,

02:48:40 23 fair, App Store?

02:48:41 24 A. Sir, just for clarification, that was something that

02:48:43 25 was reported in the San Francisco Business Times.

02:48:45 1 Q. Do you dispute that USAA's mobile deposit application  
02:48:49 2 was Apple's most popular financial app in August of 2009?

02:48:54 3 A. No, I don't.

02:48:55 4 Q. Did Apple -- did USAA pay Apple \$400,000.00 to reach  
02:49:00 5 that rank?

02:49:01 6 A. I have no basis to say one way or the other.

02:49:04 7 Q. Okay. Now, we also know about another independent  
02:49:09 8 third party who's considered issues in this case, and  
02:49:13 9 that's the Patent Office, correct? You were here for

02:49:16 10 Mr. Saffici's examination, correct?

02:49:17 11 A. Yes, I was.

02:49:18 12 Q. And we know that two separate patent examiners analyzed  
02:49:25 13 the claims at issue in this case, and granted them, fair?

02:49:28 14 A. Granted them in terms of the patents?

02:49:32 15 Q. Yes.

02:49:33 16 A. That's fair.

02:49:34 17 Q. And you testified that when you perform a damages  
02:49:42 18 analysis in this case, you have to analyze what the scope  
02:49:46 19 of the patents are, fair? Scope of the claims are?

02:49:49 20 A. That's fair.

02:49:50 21 Q. It's a crucial element of the case, correct?

02:49:53 22 A. Yes.

02:49:54 23 Q. It's the scope of the claims that defines what's at  
02:49:57 24 issue in this case, correct?

02:49:58 25 A. Yes, that's fair.

02:49:59 1 Q. But you don't know what's covered by the claims of the  
02:50:07 2 patents-in-suit, correct? It's a technical issue?

02:50:13 3 A. It's a technical issue, I understand that.

02:50:16 4 Q. Sir, and you don't know what the -- what's covered by  
02:50:20 5 the claims of the patents-in-suit, fair?

02:50:21 6 A. I have a general understanding.

02:50:23 7 MR. SHEASBY: Can we turn to Tab 1? Which is your  
02:50:30 8 deposition at Page 43, Lines 21 through 23.

02:50:35 9 A. 43, I'm sorry, what?

02:50:39 10 Q. Page 43, Lines 21 through 23.

02:50:51 11 A. And the question, please?

02:50:53 12 Q. You personally don't know what's covered by the claims  
02:50:55 13 of the patents-in-suit, correct?

02:50:59 14 A. Again, I have a general understanding.

02:51:03 15 MR. SHEASBY: Your Honor, may I now publish the  
02:51:06 16 deposition testimony to the jury?

02:51:08 17 THE COURT: You may.

02:51:09 18 MR. SHEASBY: Let's pull up Tab 1, Gerardi 2 depo,  
02:51:19 19 Page 43, Lines 21 through 23.

02:51:28 20 THE COURT: And, Mr. Sheasby, you don't need to  
02:51:29 21 ask me each time you impeach a witness. If you complete  
02:51:32 22 the impeachment process, you're entitled to show the prior  
02:51:35 23 statement.

02:51:36 24 MR. SHEASBY: Thank you, Your Honor.

02:51:42 25 THE TECHNICIAN: 43?

02:51:44 1 MR. SHEASBY: Gerardi 2 deposition, Page 43, Lines  
02:51:47 2 21 through 23.

02:51:49 3 MS. WILLIAMS: Your Honor, under the rule of  
02:51:51 4 completion -- of optional completeness, may we also have  
02:51:54 5 Lines 16 through 20 shown?

02:51:57 6 MR. SHEASBY: I'm happy to have that shown, Your  
02:51:59 7 Honor.

02:51:59 8 THE COURT: All right. Then we'll do it that way.

02:52:05 9 Q. (By Mr. Sheasby) This is a deposition I took of you,  
02:52:08 10 correct?

02:52:08 11 A. Yes.

02:52:09 12 Q. Question: Did you have an understanding of what's  
02:52:12 13 claimed by the patents-in-suit when you performed your  
02:52:15 14 apportionment analysis?

02:52:16 15 Answer: I've had what's listed -- I had what's  
02:52:19 16 listed in my report, generally speaking.

02:52:22 17 Question: Do you know what's covered by the  
02:52:23 18 claims of the patents-in-suit?

02:52:24 19 Answer: Again, I think that's a technical matter.

02:52:28 20 That was the testimony you gave under oath,  
02:52:31 21 correct, sir?

02:52:31 22 A. On those lines, that's correct.

02:52:34 23 MR. SHEASBY: Let's take that down.

02:52:36 24 MS. WILLIAMS: Your Honor, objection, that was --  
02:52:39 25 that was improper impeachment. That is totally consistent

02:52:45 1 with what Mr. Gerardi testified to, and we have not  
02:52:48 2 shown -- and Mr. -- excuse me, counsel for USAA has not  
02:52:53 3 shown otherwise.

02:52:54 4 THE COURT: You may revisit the matter on  
02:52:57 5 redirect. We're going to go forward at this point.

02:52:59 6 MS. WILLIAMS: Thank you, Your Honor.

02:53:00 7 Q. (By Mr. Sheasby) Now, the reality is that the  
02:53:09 8 patents-in-suit are broad, correct?

02:53:13 9 A. From my economic perspective, that's my general  
02:53:16 10 understanding, yes.

02:53:16 11 Q. The patents-in-suit claim remote deposit capture  
02:53:24 12 aligned for the capture of check images using scanners and  
02:53:28 13 digital cameras connected to a general purpose computer.  
02:53:30 14 They do not just claim one particular implementation,  
02:53:33 15 correct?

02:53:33 16 A. Again, to my general understanding.

02:53:39 17 Q. And you heard Mr. Saffici testify in his direct -- his  
02:53:45 18 cross-examination that the claims of the patents-in-suit  
02:53:54 19 cover MRDC, correct?

02:53:55 20 A. A specific form of MRDC, yes.

02:53:59 21 Q. You think he testified that they only covered a  
02:54:03 22 specific form of MRDC?

02:54:04 23 A. Yes, they cover MRDC, yes, that's fair.

02:54:08 24 Q. The claims cover MRDC generally, correct, sir?

02:54:13 25 A. Yes.

02:54:14 1 Q. And so when the jury values these patents, the jury  
02:54:20 2 needs to understand that these patents cover MRDC  
02:54:23 3 generally, correct?  
02:54:24 4 A. That's fair.  
02:54:26 5 Q. They don't just cover some small fraud technique, fair?  
02:54:30 6 A. I don't -- I disagree with that.  
02:54:57 7 Q. Now, let's turn to Tab 40 in your binder.  
02:55:17 8 A. Okay.  
02:55:18 9 Q. So Tab 40 in your binder is DTX-230?  
02:55:22 10 MR. SHEASBY: And let's put that up on the screen,  
02:55:24 11 Mr. Huynh.  
02:55:24 12 Q. (By Mr. Sheasby) And let's turn to Page 9 of that  
02:55:34 13 document.  
02:55:37 14 A. Okay.  
02:55:40 15 MR. SHEASBY: Go to Page 10, go one more page up,  
02:55:44 16 Mr. Huynh. Yes, let's pull that up. So if you circle the  
02:55:49 17 middle section, which is MRDC proposed concept, Mr. Huynh.  
02:56:00 18 Q. (By Mr. Sheasby) So what you told the ladies and  
02:56:02 19 gentlemen of the jury is that -- that these four boxes  
02:56:15 20 are -- on the back end are non-infringing, correct?  
02:56:18 21 A. I said they were on the back end and they were in  
02:56:23 22 existence for a period of time, well before the  
02:56:28 23 patents-in-suit.  
02:56:28 24 Q. Well, at your deposition, you told me they were  
02:56:31 25 non-infringing, correct?

02:56:32 1 A. I may have, but what I was -- what I -- okay. I may  
02:56:36 2 have.

02:56:36 3 Q. Well, why don't we turn to Tab 1, which is, again, your  
02:56:41 4 deposition, and why don't you look at -- actually let's do  
02:56:54 5 it this way.

02:56:54 6 Did you investigate whether these four boxes that  
02:56:57 7 you removed from your valuation analysis are covered by the  
02:57:00 8 claims of the patents-in-suit?

02:57:04 9 A. Yes.

02:57:10 10 Q. And you testified that Mr. Saffici told you they were  
02:57:13 11 non-infringing, correct, these four in the back, correct?

02:57:21 12 A. I may have at my deposition.

02:57:23 13 Q. Why don't we look at Page 38, 2 through 10 of your  
02:57:27 14 deposition. You can look at that right now to refresh your  
02:57:29 15 recollection, sir.

02:57:35 16 A. I'm sorry, the line numbers, please?

02:57:37 17 Q. 38, Lines 2 through 10.

02:57:48 18 You told me at your deposition that you excluded  
02:57:52 19 the 80 percent of the value of MRDC because those blocks  
02:58:00 20 were not covered by the patents, correct?

02:58:06 21 A. I stated that -- that those items had been around for a  
02:58:11 22 significant period of time before the patents had issued.

02:58:14 23 Q. Let's pull up your deposition testimony at 38, Lines 2  
02:58:18 24 through 10.

02:58:19 25 MS. WILLIAMS: Objection, Your Honor. The witness

02:58:21 1 has not testified inconsistently with his deposition. It  
02:58:26 2 would be improper to show that.

02:58:27 3 MR. SHEASBY: Your Honor, I believe it is an  
02:58:29 4 inconsistent statement.

02:58:30 5 THE COURT: It doesn't strike me as being  
02:58:36 6 inconsistent, Mr. Sheasby. It may be a slight variation on  
02:58:39 7 the same thing, but it's not completely inconsistent.

02:58:43 8 MR. SHEASBY: Okay.

02:58:44 9 Q. (By Mr. Sheasby) Mr. Saffici --

02:58:45 10 THE COURT: I'll sustain.

02:58:47 11 Q. (By Mr. Sheasby) -- claim -- you claim that  
02:58:50 12 Mr. Saffici told you those four boxes in the back were not  
02:58:53 13 infringing and not covered by the claims, correct?

02:58:59 14 A. I never stated that he -- he said that they were  
02:59:02 15 non-infringing, in those lines that you're referring to. I  
02:59:05 16 stated that he told me that those items were -- those  
02:59:08 17 components were around for a significant period of time.

02:59:11 18 Q. And you're looking at Column 38, Lines 2 through 10 of  
02:59:15 19 your deposition, sir?

02:59:15 20 A. I was extending down to Line 15, too, I apologize. If  
02:59:28 21 I looked through Line 10, that's correct.

02:59:31 22 Q. So to be clear, in your deposition in sworn testimony  
02:59:35 23 under oath, you told me that Mr. Saffici told you that this  
02:59:42 24 80 percent on the back end was not covered by the claims of  
02:59:46 25 the patent, correct?

02:59:47 1 MS. WILLIAMS: Objection, Your Honor. It  
02:59:49 2 mischaracterizes the deposition testimony and fails to  
02:59:51 3 include what is continuing on to Page 38. He's completely  
02:59:54 4 taking this witness's testimony out of context in front of  
02:59:57 5 the jury.

02:59:58 6 THE COURT: He's entitled to ask the question he's  
03:00:01 7 asked, Ms. Williams. Overruled. You're entitled to  
03:00:09 8 address it later.

03:00:11 9 A. The question again, please, I'm sorry.

03:00:11 10 Q. (By Mr. Sheasby) Mr. Saffici -- you told me at your  
03:00:13 11 deposition, sworn to under oath, that Mr. Saffici told you  
03:00:14 12 that 80 percent of those four or five boxes in the back  
03:00:17 13 were non-infringing, correct? That's what you testified to  
03:00:20 14 under oath?

03:00:21 15 A. For the lines you've just given me, that's correct.

03:00:25 16 Q. That's what you said under oath, correct?

03:00:27 17 A. For the lines that you have given me, that's correct.

03:00:30 18 Q. The reality is that Mr. Saffici was not involved in  
03:00:32 19 this infringement case at all, correct?

03:00:34 20 A. That's correct.

03:00:34 21 Q. It would have been impossible for Mr. Saffici to have  
03:00:37 22 told you that those black boxes were not infringing,  
03:00:46 23 correct?

03:00:46 24 THE COURT: Counsel, approach the bench.

03:00:54 25 Mr. Melsheimer, join us up here.

03:00:56 1 (Bench conference.)

03:00:59 2 THE COURT: I can hear you telling Ms. Williams

03:01:06 3 what to ask. If you all are going to communicate, do it in

03:01:09 4 a way that's silent, pass notes, but I'm hearing the two of

03:01:13 5 you -- or I'm hearing you talk to her.

03:01:15 6 MR. MELSHEIMER: I apologize.

03:01:16 7 THE COURT: And if I can hear it, the jury can

03:01:19 8 hear it, so that needs to stop.

03:01:20 9 MR. MELSHEIMER: I understand.

03:01:21 10 MS. WILLIAMS: Your Honor, while we're here, may I

03:01:23 11 object to this line of questioning. He is taking --

03:01:25 12 Mr. Sheasby is taking the witness's testimony completely

03:01:27 13 out of context and asking him questions. In the very next

03:01:32 14 line he says Mr. Saffici did not provide -- did not provide

03:01:34 15 an infringement report. He relied on Dr. Villasenor. I

03:01:38 16 mean, this is categorically --

03:01:39 17 THE COURT: Ms. Williams -- Ms. Williams, you can

03:01:41 18 address it on redirect.

03:01:42 19 MS. WILLIAMS: Yes, Your Honor.

03:01:43 20 THE COURT: And if you do it effectively, I'm sure

03:01:46 21 it will have a positive effect for your side of the case.

03:01:48 22 But standing up and making these narrative objections about

03:01:52 23 this is out of context and it does this, this -- those are

03:01:56 24 not objections. That's why I said in front of the jury

03:01:59 25 last time he was entitled to ask the question. Your

03:02:01 1 objections are mini speeches in front of the jury, and they  
03:02:06 2 shouldn't be that. If you've got a legal basis to make an  
03:02:09 3 objection, raise the legal basis and I'll address it.

03:02:12 4 MS. WILLIAMS: Yes, Your Honor.

03:02:13 5 THE COURT: But right now, I'm overruling this  
03:02:14 6 line of objections, and I'm telling you the appropriate way  
03:02:17 7 is for you to take it back up. If you think he's taking it  
03:02:21 8 out of context, revisit it on redirect.

03:02:24 9 MS. WILLIAMS: Yes, Your Honor.

03:02:25 10 THE COURT: All right. Let's proceed.

03:02:26 11 (Bench conference concluded.)

03:02:30 12 THE COURT: Let's proceed.

03:02:32 13 Q. (By Mr. Sheasby) Mr. Saffici didn't perform any  
03:02:38 14 infringement analysis, correct?

03:02:39 15 A. That's correct.

03:02:39 16 Q. Now, you were here for Dr. Villasenor's testimony,  
03:02:45 17 correct?

03:02:45 18 A. Correct.

03:02:45 19 Q. Dr. Villasenor didn't testify to the ladies and  
03:02:48 20 gentlemen of the jury that the four things that you removed  
03:02:51 21 from the MRDC system were non-infringing, correct?

03:02:54 22 A. That's correct.

03:02:56 23 Q. So we know that Mr. Saffici couldn't have told you that  
03:03:01 24 what you said was non-infringing was non-infringing,  
03:03:08 25 correct?

03:03:08 1 A. Repeat your question, please.

03:03:11 2 Q. You told me under oath that Mr. Saffici told you these

03:03:16 3 four things were non-infringing, correct?

03:03:23 4 A. On those lines, that's correct.

03:03:24 5 Q. Mr. Saffici has no infringement opinion whatsoever,

03:03:33 6 correct?

03:03:33 7 A. That's correct.

03:03:33 8 Q. Dr. Villasenor has provided no opinion on this question

03:03:36 9 either, correct?

03:03:37 10 A. That's correct.

03:03:37 11 Q. So where have you got that answer from that these are

03:03:42 12 non-infringing? It could never have been from Mr. Saffici

03:03:45 13 or Dr. Villasenor, correct?

03:03:49 14 A. I can't agree with that completely. May I explain?

03:03:55 15 Q. Let me ask it another way. In your report, you don't

03:03:59 16 cite to any footnote in which Dr. Villasenor told you that

03:04:02 17 those four black boxes are non-infringing, correct?

03:04:07 18 A. That's correct.

03:04:07 19 Q. In your report, you don't cite to any footnote that

03:04:11 20 says Mr. Saffici told you those are non-infringing,

03:04:14 21 correct?

03:04:14 22 A. That's correct.

03:04:14 23 Q. And we agree that what words are used in depositions

03:04:17 24 under oath matter, correct?

03:04:19 25 A. That's fair.

03:04:20 1 Q. And in your testimony earlier, you told me that  
03:04:23 2 Mr. Saffici told you they were non-infringing, fair?  
03:04:26 3 A. On the lines that you referenced, that's correct.  
03:04:28 4 Q. And you had an opportunity to correct your deposition,  
03:04:32 5 correct?  
03:04:32 6 A. Yes.  
03:04:32 7 Q. And you understand this is an incredibly important case  
03:04:34 8 for USAA, correct?  
03:04:35 9 A. Yes, I do.  
03:04:36 10 Q. And you understand that USAA views this technology as  
03:04:40 11 incredibly important, correct?  
03:04:41 12 A. USAA what? I can't hear you.  
03:04:43 13 Q. Views this technology as incredibly important, correct?  
03:04:49 14 A. Yes, they do.  
03:04:49 15 Q. And you understand why USAA believes it's important to  
03:04:53 16 be precise in testimony under oath, fair?  
03:04:55 17 A. Yes.  
03:04:56 18 Q. Now, you also talk about non-infringing alternatives,  
03:05:06 19 correct?  
03:05:06 20 A. I do.  
03:05:07 21 Q. And I think you said to the jury that non-infringing  
03:05:15 22 alternatives represent a cap on damages, fair?  
03:05:18 23 A. I said they could be considered a cap in part of the  
03:05:22 24 hypothetical negotiation, that's fair.  
03:05:23 25 Q. So if you can turn to Paragraph 90 -- 91 of your expert

03:05:27 1 report, which is in Tab 3.

03:05:45 2 A. I see it.

03:05:46 3 Q. Now, in Tab 3, you list a bunch of bullet points of  
03:05:50 4 elements that you believe would reflect  
03:05:53 5 commercially viable -- or non-infringing alternatives,  
03:05:57 6 correct?

03:05:57 7 A. Yes, I do.

03:06:03 8 Q. And it includes the non-infringing alternative that  
03:06:11 9 Dr. Villasenor discussed, correct?

03:06:12 10 A. That's fair.

03:06:14 11 Q. Now, all the alternative -- what you describe as  
03:06:18 12 non-infringing alternatives that you list in your report,  
03:06:21 13 you didn't speak to any independent expert as to whether  
03:06:25 14 any of those are acceptable in the market, correct?

03:06:27 15 A. That's fair.

03:06:30 16 MR. SHEASBY: Your Honor, may I approach briefly  
03:06:35 17 to seek guidance?

03:06:36 18 THE COURT: Approach the bench?

03:06:38 19 MR. SHEASBY: Yes, sir.

03:06:39 20 THE COURT: Approach the bench, counsel.

03:06:45 21 (Bench conference.)

03:06:46 22 THE COURT: What is it?

03:06:47 23 MR. SHEASBY: In order to be a viable  
03:06:49 24 non-infringing alternative, you had to have analyzed  
03:06:51 25 whether it was covered by any other patents. Mr. Gerardi

03:06:53 1 has not done that analysis.

03:06:55 2 In particular, he hasn't analyzed whether it's  
03:06:58 3 covered by any other USAA patents. It's relevant from a  
03:07:01 4 legal damages standpoint, but it's complicated from your  
03:07:04 5 MIL standpoint. And I just wanted to get guidance if -- if  
03:07:08 6 Your Honor -- I don't know what to do. I feel like I have  
03:07:12 7 to make my legal case because we are going to JMOL --

03:07:15 8 THE COURT: Tell me what you want to ask the  
03:07:17 9 witness and what you want -- and what you want leave from  
03:07:19 10 the existing orders in limine to ask the witness.

03:07:22 11 MR. SHEASBY: Mr. Gerardi, you didn't analyze  
03:07:24 12 whether your non-infringing alternative would infringe  
03:07:26 13 other USAA patents?

03:07:30 14 THE COURT: Does Defendant object to that?

03:07:32 15 MS. WILLIAMS: Yes, Your Honor, we do object to  
03:07:33 16 that.

03:07:33 17 Number one, it violates the MIL.

03:07:35 18 Number two, the analysis here does not -- does not  
03:07:39 19 depend on -- on that question.

03:07:41 20 Mr. Sheasby can get the information that he needs  
03:07:44 21 about the non-infringing alternative without talking about  
03:07:47 22 the first case and any other patents that USAA has.

03:07:50 23 MR. SHEASBY: This is a valid concern. Here's the  
03:07:53 24 issue. I believe if I'm able to establish that he  
03:07:56 25 doesn't -- hasn't done an analysis as to whether it

03:07:58 1 infringes other USAA patents, they're not going to be able  
03:08:00 2 to discuss the NIA in closing because a requirement of an  
03:08:04 3 NIA is that it not infringe any other patents. And so  
03:08:09 4 that's -- so that's the issue I'm struggling with.

03:08:12 5 MS. WILLIAMS: Your Honor, that is not a  
03:08:14 6 requirement of the non-infringing alternative analysis.

03:08:16 7 THE COURT: All right. Let's get back to the  
03:08:17 8 issue.

03:08:18 9 At this point, given the context of where we are,  
03:08:21 10 I am not persuaded that I should grant the Plaintiff leave  
03:08:24 11 to deviate from the MIL orders that are in place.

03:08:28 12 MR. SHEASBY: I understand, Your Honor.

03:08:30 13 THE COURT: All right.

03:08:31 14 MR. SHEASBY: Thank you, Your Honor.

03:08:31 15 THE COURT: While you two are here, how much  
03:08:33 16 longer do you expect your cross to go, Mr. Sheasby?

03:08:36 17 MR. SHEASBY: 30 minutes.

03:08:37 18 THE COURT: All right. And are you going to have  
03:08:39 19 redirect, Ms. Williams?

03:08:40 20 MS. WILLIAMS: Yes, Your Honor, but it will be  
03:08:42 21 very brief.

03:08:48 22 THE COURT: All right. Let's proceed.

03:08:48 23 (Bench conference concluded.)

03:08:51 24 THE COURT: Let's proceed, counsel.

03:08:54 25 Q. (By Mr. Sheasby) And Dr. Villasenor didn't investigate

03:08:56 1 whether any of these non-infringing alternatives you  
03:09:01 2 identify are commercially viable, correct?  
03:09:04 3 A. I believe that's fair.  
03:09:05 4 Q. Dr. Villasenor didn't investigate whether any of what  
03:09:08 5 is -- what he describes as non-infringing alternatives are  
03:09:13 6 legal or even allowed under regulation, correct?  
03:09:15 7 A. I believe that's fair.  
03:09:16 8 Q. And you have no qualifications to assess banking and  
03:09:20 9 regulatory laws in terms of risk management, correct?  
03:09:23 10 A. That's correct.  
03:09:24 11 Q. You've done no analysis whatsoever as to whether what  
03:09:27 12 you told the jury was a commercially viable non-infringing  
03:09:31 13 alternative is actually commercially feasible, correct?  
03:09:34 14 A. I can't completely agree with that.  
03:09:36 15 Q. You have no expertise building or running a remote  
03:09:43 16 deposit capture system, correct?  
03:09:44 17 A. That's fair.  
03:09:45 18 Q. From a professional standpoint, you've never ran a  
03:09:49 19 bank, never ran an MRDC system, correct?  
03:09:58 20 A. That's correct.  
03:09:59 21 Q. You testified at your deposition that Mr. Saffici told  
03:10:03 22 you that the bullet points in your expert report that were  
03:10:08 23 non -- that were non-infringing were commercially viable,  
03:10:14 24 correct?  
03:10:14 25 A. I believe I said something to that extent in my

03:10:17 1 deposition.

03:10:17 2 Q. Why don't you turn to Tab 2, Lines 85, 15 through 23.

03:10:33 3 A. 85, I'm sorry, again, the lines?

03:10:36 4 MS. WILLIAMS: Objection, Your Honor. Tab 2 is --

03:10:40 5 is -- may we approach, Your Honor?

03:10:42 6 THE COURT: Approach the bench.

03:10:47 7 (Bench conference.)

03:10:47 8 MS. WILLIAMS: Your Honor, Tab 2 in the binder is

03:10:52 9 the deposition related to the first case and wouldn't have

03:10:57 10 any bearing on the non-infringing alternatives in this

03:10:58 11 case.

03:10:59 12 MR. SHEASBY: It's not intending -- I'm taking him

03:11:02 13 to the Case 2 deposition. So let me just go check the

03:11:05 14 binder number, but, no, Ms. Williams, I'm absolutely --

03:11:09 15 MS. WILLIAMS: You said Tab 2.

03:11:10 16 THE COURT: Speak quietly, counsel.

03:11:12 17 MS. WILLIAMS: Yes, Your Honor. Tab 1 -- Tab 1 is

03:11:13 18 the first --

03:11:14 19 MR. SHEASBY: Okay. So we'll go to Tab 1. Thank

03:11:16 20 you for that.

03:11:16 21 MS. WILLIAMS: All right.

03:11:17 22 THE COURT: All right. Let's proceed.

03:11:20 23 (Bench conference concluded.)

03:11:22 24 THE COURT: Let's proceed.

03:11:30 25 Q. (By Mr. Sheasby) Let's actually go to Tab 1,

03:11:33 1 Mr. Gerardi.

03:11:34 2 A. Okay.

03:11:35 3 Q. And if we can look at Page 85, Lines 15 through 23.

03:11:54 4 A. Okay.

03:11:55 5 Q. You testified that Mr. Saffici told you that your

03:11:58 6 bullet points were non-infringing alternatives that were

03:12:08 7 commercially viable, correct?

03:12:09 8 A. Which lines again? I'm sorry, sir.

03:12:11 9 Q. Sure. 85, Lines 15 through 23.

03:12:17 10 A. My answer was: Mr. Saffici advised me that from a

03:12:21 11 consumer standpoint, he didn't believe these would affect

03:12:24 12 the consumer's side of the liability equation.

03:12:27 13 Q. You understand then when I asked Mr. Saffici whether he

03:12:32 14 had done any analysis of your bullet points, he testified

03:12:34 15 that he had not, correct?

03:12:36 16 A. At his deposition, I believe that's correct.

03:12:38 17 Q. In fact, Mr. Saffici test -- testified that he had done

03:12:46 18 nothing to investigate whether the bullet points that you

03:12:48 19 list are feasible non-infringing alternatives that were

03:12:51 20 actually commercially viable, correct?

03:12:53 21 A. That's what he said at his deposition. May I explain?

03:12:57 22 Q. Mr. -- Mr. Gerardi --

03:13:00 23 MR. SHEASBY: Your Honor, I -- I object as

03:13:02 24 non-responsive.

03:13:09 25 THE COURT: You -- you're not entitled to ask

03:13:12 1 counsel if you can explain something. You're here to  
03:13:14 2 answer the questions. Counsel for Wells Fargo will have an  
03:13:17 3 opportunity to revisit it if they believe in their judgment  
03:13:21 4 it needs to be readdressed.

03:13:22 5 THE WITNESS: Yes, Your Honor.

03:13:24 6 THE COURT: Let's proceed on that basis.

03:13:27 7 Q. (By Mr. Sheasby) So just so the record is clear, at  
03:13:28 8 deposition you told me that Mr. Saffici had advised you  
03:13:31 9 that a number of the bullet points that you list as  
03:13:33 10 non-infringing alternatives, he didn't believe they'd  
03:13:35 11 accept -- they'd affect the customer side of the liability  
03:13:38 12 equation, correct?

03:13:39 13 A. Correct.

03:13:39 14 Q. And at deposition, Mr. Saffici testified that he did no  
03:13:43 15 analysis whatsoever as to whether your bullet points were  
03:13:47 16 commercially viable, fair?

03:13:48 17 A. That's fair.

03:13:49 18 Q. So Mr. Hecht, who was Wells Fargo's corporate  
03:14:00 19 representative, didn't discuss your bullet points, correct?

03:14:05 20 A. Which bullet points?

03:14:06 21 Q. Your non-infringing alternatives, correct?

03:14:08 22 A. That's fair.

03:14:09 23 Q. He -- he testified that he had decades and decades of  
03:14:14 24 experience in the banking industry, correct?

03:14:17 25 A. Yes.

03:14:18 1 Q. He never told you that your non-infringing alternative  
03:14:21 2 was commercially viable, correct?  
03:14:23 3 A. No, he did not.  
03:14:26 4 Q. Mr. Villa -- Dr. Villasenor never told you it was  
03:14:34 5 commercially viable, correct?  
03:14:36 6 A. That's correct.  
03:14:37 7 Q. And Mr. Saffici testified that he never told you that  
03:14:40 8 it was commercially viable, correct?  
03:14:43 9 A. At his deposition, that's correct.  
03:14:48 10 Q. Now, you testified that Mr. Weinstein didn't perform  
03:14:52 11 any type of cost savings analysis, fair?  
03:14:59 12 A. I believe I said something to that extent, yes.  
03:15:02 13 Q. If you go to slides -- Mr. Weinstein's demonstratives  
03:15:05 14 at Slide 45.  
03:15:24 15 Now, this is the slide that Mr. Weinstein showed  
03:15:27 16 to the ladies and gentlemen of the jury, correct?  
03:15:29 17 A. Yes, it is.  
03:15:32 18 Q. He showed, that from 2014 to 2018, if mobile deposit  
03:15:37 19 was going to go through a teller, it would be \$2.46,  
03:15:42 20 correct?  
03:15:42 21 A. That's what's listed on that slide.  
03:15:44 22 Q. If it was going through an ATM, it would be \$1.41  
03:15:50 23 percent [sic], correct?  
03:15:50 24 A. \$1.41, correct?  
03:15:52 25 Q. \$1.41, correct?

03:15:52 1 A. Yes, that's what's on that slide.

03:15:54 2 Q. And if it was MRDC, it would be 35 cents per deposit,

03:15:59 3 right?

03:15:59 4 A. That's what's on his slide.

03:16:01 5 Q. And that creates a cost savings of between a dollar and

03:16:05 6 \$2.00 for every single deposit, correct?

03:16:07 7 A. That's what he has listed on his slide.

03:16:09 8 Q. And you didn't provide any alternative cost numbers,

03:16:12 9 correct?

03:16:12 10 A. In response to that, no, I did not.

03:16:15 11 Q. And so the only cost numbers the jury is going to hear

03:16:18 12 are the cost numbers that are on -- in Mr. Weinstein's

03:16:20 13 testimony and Ms. Lockwood-Stein's testimony, correct?

03:16:22 14 A. I believe so.

03:16:23 15 Q. And at your deposition we discussed what the

03:16:43 16 implication of these cost savings numbers are, correct?

03:16:46 17 A. I believe so, yes.

03:16:49 18 Q. And we discussed the fact that if you calculated only

03:16:55 19 the cost savings that Wells Fargo achieved by using MRDC

03:17:02 20 for just one year in 2018, it would be \$100 million,

03:17:11 21 correct?

03:17:11 22 MS. WILLIAMS: Objection, Your Honor. May we

03:17:12 23 approach?

03:17:13 24 THE COURT: What's your objection, counsel?

03:17:18 25 MS. WILLIAMS: Your Honor, it is outside --

03:17:20 1 outside his report. Mr. Gerardi did not do this  
03:17:25 2 calculation.

03:17:32 3 MR. SHEASBY: Your Honor, I'm happy to respond.

03:17:34 4 THE COURT: What's your response?

03:17:35 5 MR. SHEASBY: Well, one, Mr. Gerardi has  
03:17:40 6 represented that Mr. Weinstein did not do a cost savings  
03:17:42 7 analysis.

03:17:43 8 Two, I'm establishing that he did a cost savings  
03:17:46 9 analysis.

03:17:47 10 And, three, I'm now going to establish that this  
03:17:50 11 witness did his own -- calculated that cost savings would  
03:17:54 12 actually be in excess of what Mr. Weinstein did.

03:17:57 13 THE COURT: What's your response to the objection  
03:18:00 14 that this is beyond the scope of this witness's expert  
03:18:03 15 report? That's the objection that's been raised, not --  
03:18:06 16 not what you think you're going to do for the next 10 or 15  
03:18:09 17 minutes.

03:18:09 18 MR. SHEASBY: I understand, Your Honor.

03:18:10 19 My response is that Mr. -- Mr. Gerardi does  
03:18:15 20 discuss cost savings in his report.

03:18:19 21 THE COURT: And is this discussed by Mr. Gerardi  
03:18:22 22 in his report?

03:18:23 23 MR. SHEASBY: The underlying data is discussed in  
03:18:25 24 his report, Your Honor.

03:18:26 25 THE COURT: Are these conclusions discussed in his

03:18:28 1 report?

03:18:28 2 MR. SHEASBY: They are not discussed in his  
03:18:30 3 report.

03:18:30 4 THE COURT: Then I'll sustain the objection.

03:18:32 5 Q. (By Mr. Sheasby) Now, I note that you -- you believe  
03:18:57 6 that there are some patents that can be worth hundreds of  
03:19:00 7 millions of dollars, correct?

03:19:01 8 A. I'm sorry, repeat your question.

03:19:03 9 Q. You believe that there are some patents that can be  
03:19:07 10 worth hundreds of millions of dollars, correct?

03:19:10 11 A. You mean in a general context?

03:19:12 12 MR. SHEASBY: Your Honor, objection,  
03:19:14 13 non-responsive.

03:19:15 14 THE COURT: Overruled. He's asking for  
03:19:17 15 clarification. He's entitled to do that.

03:19:20 16 Q. (By Mr. Sheasby) There are some patents that can be  
03:19:24 17 worth hundreds of millions of dollars that you've been  
03:19:26 18 involved with, correct?

03:19:28 19 A. That I've been involved with over my career, yes,  
03:19:31 20 that's -- that's true.

03:19:32 21 Q. Now, in this case, you've -- telling the ladies and  
03:19:39 22 gentlemen of the jury that for these 120 million deposits  
03:19:45 23 that Wells Fargo has made using a system you must assume is  
03:19:50 24 infringed, USAA would get how many cents per deposit under  
03:19:55 25 your damages analysis?

03:19:56 1 A. I haven't performed that calculation.

03:19:59 2 Q. It's less than a cent, correct?

03:20:03 3 A. I believe so. But I haven't performed that

03:20:05 4 calculation.

03:20:06 5 Q. It's -- it's .000 some cent, correct?

03:20:13 6 A. Again, sir, I haven't performed the calculation.

03:20:16 7 Q. So what we know is the following. We know from the

03:20:18 8 testimony that Wells Fargo, through its EW -- EWS system,

03:20:24 9 charges USAA 60 cents for every out of network sale

03:20:30 10 transaction, correct? That was -- that's in the record?

03:20:31 11 A. I'm sorry. Just repeat your question again.

03:20:34 12 THE COURT: Counsel, are you still inquiring as to

03:20:37 13 this demonstrative?

03:20:37 14 MR. SHEASBY: I am, Your Honor.

03:20:39 15 THE COURT: All right. Proceed.

03:20:41 16 Q. (By Mr. Sheasby) We know from testimony earlier this

03:20:47 17 week that Wells Fargo, through EWS, charges USAA 60 cents

03:20:53 18 per Zelle transaction, correct? That was testified to?

03:20:56 19 A. I don't know if I agree with that.

03:20:59 20 Q. EWS charges USAA 60 cents for certain Zelle

03:21:05 21 transactions, correct?

03:21:06 22 A. EWS charges for Zelle transactions.

03:21:09 23 Q. It's approximately 60 cents, correct?

03:21:11 24 A. I believe it -- depending on the type of transaction,

03:21:14 25 that's correct.

03:21:15 1 Q. EW -- EWS is partially owned by Wells Fargo, correct?

03:21:18 2 A. Partially owned, that's correct.

03:21:24 3 Q. Mr. Brady testified that Wells Fargo charges USAA's

03:21:25 4 customers \$3.50 when USAA's customers attempt to use Wells

03:21:36 5 Fargo's ATM, correct? He testified to that?

03:21:37 6 A. I believe that's what he said, yes.

03:21:38 7 Q. And your conclusion in a hypothetical negotiation, with

03:21:40 8 120 million infringing transactions and cost savings

03:21:42 9 between a dollar and \$2.00 per transaction, that USAA would

03:21:46 10 settle for less than one cent per transaction? That's your

03:21:49 11 testimony to the jury, correct?

03:21:50 12 A. Based upon my calculations, yes, absolutely.

03:21:53 13 MR. SHEASBY: I have no further questions.

03:21:56 14 THE COURT: You pass the witness?

03:21:57 15 MR. SHEASBY: I pass the witness.

03:21:59 16 THE COURT: All right. Approach the bench,

03:22:12 17 counsel.

03:22:12 18 (Bench conference.)

03:22:12 19 THE COURT: All right. I want to discuss managing

03:22:19 20 the remaining time for trial with you all.

03:22:22 21 Plaintiff's got approximately two hours and two

03:22:30 22 minutes. Defendant's got 15 minutes. I understand

03:22:34 23 Defendant has 15 minutes of deposition -- 12 -- 13 minutes?

03:22:39 24 MR. MELSHEIMER: We're not going to play that,

03:22:41 25 Judge. We're just going to use it on Mr. Gerardi.

03:22:43 1 THE COURT: All right. Now, Plaintiff's going to  
03:22:45 2 play depositions in rebuttal?

03:22:47 3 MR. SHEASBY: Yes, Your Honor.

03:22:48 4 THE COURT: Are there portions of that rebuttal  
03:22:49 5 that are counter-designations chargeable to Defendant?

03:22:52 6 MR. SHEASBY: There are.

03:22:54 7 MR. MELSHEIMER: Less than a minute is what my  
03:22:55 8 understanding is on --

03:22:56 9 THE COURT: So you're planning to go forward with  
03:22:58 10 redirect of about 14 minutes?

03:23:00 11 MR. MELSHEIMER: About 14 minutes, Your Honor.

03:23:02 12 THE COURT: Is that going to be adequate to  
03:23:04 13 complete the process?

03:23:05 14 MR. MELSHEIMER: Are you asking me if I want some  
03:23:07 15 more time?

03:23:08 16 THE COURT: I asked you if it's going to be  
03:23:11 17 adequate to complete the process, and I want an honest  
03:23:14 18 answer.

03:23:17 19 MR. MELSHEIMER: Your Honor, we could use a few  
03:23:21 20 more minutes, frankly.

03:23:22 21 MR. SHEASBY: Your Honor, I can be clear, we're  
03:23:24 22 not going to recut a deposition play for -- they don't need  
03:23:27 23 to be concerned about that. We'll play what's been  
03:23:30 24 designated in the rebuttal case. We're not going to recut  
03:23:32 25 at this point. They can have all the time they have left.

03:23:35 1 MR. MELSHEIMER: If that's the case, then I think  
03:23:37 2 we can do it.

03:23:37 3 THE COURT: Then let's do it. Let's go forward  
03:23:39 4 with what we have. I just don't want a moving target and  
03:23:41 5 somebody gets caught in -- caught in a bind.

03:23:44 6 MS. WILLIAMS: Thank you, Your Honor.

03:23:44 7 THE COURT: Let's proceed with redirect.

03:23:46 8 (Bench conference concluded.)

03:23:52 9 THE COURT: Let's proceed with redirect by the  
03:23:54 10 defendant.

03:24:21 11 MS. WILLIAMS: Your Honor, may I have a moment to  
03:24:23 12 make some room for my binders, please?

03:24:28 13 THE COURT: You may. You may.

03:25:05 14 MS. WILLIAMS: May it please the Court.

03:25:06 15 THE COURT: You may proceed.

03:25:08 16 MS. WILLIAMS: Thank you, Your Honor.

03:25:10 17 Q. (By Ms. Williams) Mr. Gerardi, you were asked some  
03:25:13 18 questions about a Celent article from 2009; do you recall  
03:25:15 19 those questions?

03:25:16 20 A. Yes, I do.

03:25:17 21 Q. Was that Celent article addressing MRDC generally, or  
03:25:21 22 was it addressing the inventions in the patents in this  
03:25:24 23 case?

03:25:25 24 A. Generally speaking. It wasn't addressing the patents  
03:25:29 25 in this case. It was I think nine years before the patents

03:25:31 1 in the case.

03:25:32 2 Q. You were asked some questions about -- about  
03:25:35 3 Mr. Weinstein's theories in this case. The -- what is your  
03:25:43 4 understanding as to the inventions that he valued,  
03:25:46 5 regardless of the model that he used?

03:25:48 6 A. He stated they're -- both of his models are based upon  
03:25:54 7 fraud and fraud benefits as part of his calculations.

03:25:59 8 Q. You were also asked some questions about whether you  
03:26:04 9 relied on Mr. Saffici in preparing your analysis in this  
03:26:11 10 case. Do you recall those questions?

03:26:13 11 MR. SHEASBY: Your Honor, I object. That's an  
03:26:14 12 argumentative statement.

03:26:15 13 THE COURT: Overruled.

03:26:20 14 Q. (By Ms. Williams) Do you recall?

03:26:22 15 A. Yes, I do.

03:26:22 16 Q. Okay. And then do you -- when you -- why did you speak  
03:26:30 17 with Mr. Saffici in this case?

03:26:31 18 A. Again, to get an understanding of those back end  
03:26:34 19 systems and to see -- get an understanding of when they  
03:26:39 20 have been in place and for how long they've been in place.

03:26:42 21 Q. And what is your understanding based on your  
03:26:44 22 conversations with Mr. Saffici about how long those have  
03:26:46 23 been in place?

03:26:47 24 A. Those back end systems have been in place for years, if  
03:26:50 25 not decades, prior to the patents being issued.

03:26:53 1 Q. Did you rely on Mr. Saffici to provide a  
03:26:57 2 non-infringement analysis for you in this case?  
03:26:59 3 A. No, I did not.  
03:26:59 4 Q. Is that consistent or inconsistent with your deposition  
03:27:03 5 testimony previously?  
03:27:04 6 A. It's consistent.  
03:27:07 7 Q. When you spoke with Mr. Saffici in this case, did you  
03:27:17 8 speak with him about non-infringing alternatives?  
03:27:21 9 A. Not directly, no.  
03:27:23 10 Q. When you were being questioned by counsel for USAA, do  
03:27:32 11 you recall being asked questions about being advised by  
03:27:35 12 Mr. Saffici from a consumer standpoint that he didn't  
03:27:38 13 believe that the non-infringing alternatives would affect  
03:27:41 14 the customer side of the viability equation?  
03:27:44 15 A. Yes, I remember that.  
03:27:45 16 Q. Okay. When did you speak with Mr. Saffici about that?  
03:27:48 17 A. After his deposition and before my deposition.  
03:27:50 18 Q. All right. And does your -- does your number in this  
03:28:03 19 case, the 3.98 million lump-sum number, depend in any way  
03:28:09 20 on whether the non-infringing alternatives are correct or  
03:28:12 21 not correct?  
03:28:14 22 A. No.  
03:28:14 23 Q. Your 3. --  
03:28:15 24 A. It sets a cap for what I think the lump sum would be.  
03:28:27 25 MS. WILLIAMS: Your Honor, may I have a moment to

03:28:29 1 confer with counsel?

03:28:30 2 THE COURT: You may.

03:29:02 3 MS. WILLIAMS: May it please the Court.

03:29:04 4 Q. (By Ms. Williams) Mr. Gerardi, you were asked some  
03:29:06 5 questions about -- about Zelle. Is -- what is your  
03:29:10 6 understanding about Zelle?

03:29:12 7 A. Zelle is a service that helps customers transfer money  
03:29:19 8 between each other. You can Zelle or via -- via your app  
03:29:23 9 send money back and forth to each other.

03:29:26 10 Q. And if -- and in the context of Zelle, there -- if --  
03:29:30 11 if a customer uses it, they actually get a service, right?

03:29:33 12 A. Correct.

03:29:33 13 Q. And EWS provides that service?

03:29:36 14 A. I believe that's the company that provides Zelle, yes.

03:29:38 15 Q. And for providing that service, EWS charges?

03:29:42 16 A. Oh, yes, they do.

03:29:45 17 Q. Okay. And how is -- in the context of -- of this -- of  
03:29:51 18 this case, what -- would Wells Fargo get any services from  
03:29:58 19 USAA?

03:29:58 20 A. No, as you heard earlier, I think -- I forgot which  
03:30:03 21 witness, but basically is what they get is a permission  
03:30:07 22 slip to use the patents. Zelle is someone providing the  
03:30:10 23 hardware, the software, the people, all the capital to make  
03:30:13 24 that business run. In this case, you're getting a  
03:30:17 25 permission slip to use the patents. So Wells Fargo would

03:30:19 1 have to do something with that permission slip.

03:30:22 2 Q. Mr. Gerardi, do you stand by the opinions that you've

03:30:35 3 rendered in this case?

03:30:36 4 A. Oh, absolutely.

03:30:36 5 Q. And so what is the -- what is the amount that Wells

03:30:41 6 Fargo would -- would be willing to -- to pay in a

03:30:46 7 hypothetical negotiation?

03:30:47 8 A. Based upon the analyses that I've performed, I believe

03:30:51 9 that the claims provided in the patent, a value of

03:30:54 10 \$3.98 million.

03:30:55 11 Q. Have you performed a per -- per unit royalty rate in

03:30:58 12 this case?

03:30:58 13 A. No, I have not.

03:30:59 14 Q. And so -- why not?

03:31:02 15 A. Again, looking at my calculation, looking at the

03:31:05 16 totality of the lump sum that would come out of that

03:31:07 17 hypothetical negotiation, that would give Wells Fargo the

03:31:10 18 ability to continue offering their product.

03:31:14 19 MS. WILLIAMS: Your Honor, I pass the witness.

03:31:16 20 THE COURT: All right. Further cross-examination

03:31:20 21 by the Defendant [sic].

03:31:23 22 MR. SHEASBY: Briefly, Your Honor.

03:31:26 23 THE COURT: Briefly, all right. Let it so be

03:31:29 24 noted in the record.

03:31:31 25 Q. (By Mr. Sheasby) Mr. Gerardi, when you calculated your

03:31:33 1 \$3.98 million number -- number, you didn't take into  
03:31:41 2 account any profits or cost savings or ecosystem benefits  
03:31:47 3 or wow benefits that Wells Fargo will continue to obtain if  
03:31:55 4 it continues to use this technology through the dates of  
03:31:57 5 its expiration, correct?  
03:31:59 6 A. My calculation is based upon, again, what I performed,  
03:32:02 7 which I believe is the benefits of the claims of the  
03:32:07 8 patent.  
03:32:07 9 Q. But your damages number that you listed to the jury is  
03:32:11 10 for a set period of time, correct?  
03:32:12 11 A. It is.  
03:32:13 12 Q. You didn't take into account profits that would occur  
03:32:15 13 after that set period of time, correct?  
03:32:17 14 A. For the reasons I've stated, no, I did not.  
03:32:19 15 Q. You didn't take into account the cost savings that  
03:32:25 16 would occur after that set period of time, correct?  
03:32:26 17 A. Again, for all the reasons I've stated why I performed  
03:32:29 18 my calculations and why I didn't, I didn't think it was  
03:32:31 19 necessary to do that.  
03:32:31 20 Q. You didn't take into account the growth and profits  
03:32:35 21 that mobile deposit would incur through 20 -- 2026 when  
03:32:39 22 these patents expire, correct?  
03:32:40 23 A. Again, for the reasons I explained to you, no, I didn't  
03:32:43 24 think that was necessary.  
03:32:44 25 Q. Now, you testified that it would be extremely

03:32:50 1 inexpensive for Wells Fargo to remove the infringing  
03:32:54 2 functionality, correct?

03:32:55 3 MS. WILLIAMS: Objection, Your Honor. It's beyond  
03:32:57 4 the scope of cross-examination.

03:32:59 5 THE COURT: Overruled.

03:33:00 6 MS. WILLIAMS: I mean, redirect, sorry.

03:33:02 7 THE COURT: Overruled.

03:33:03 8 A. Repeat your question.

03:33:04 9 Q. (By Mr. Sheasby) You said it would be extremely  
03:33:07 10 inexpensive for Wells Fargo to remove the infringing  
03:33:09 11 functionality in this case, correct?

03:33:10 12 A. I don't think I stated that exactly. I stated that it  
03:33:13 13 would cost less than that amount to implement the  
03:33:16 14 non-infringing alternative.

03:33:16 15 Q. It would cost Wells Fargo less than \$3.98 million to  
03:33:22 16 implement a non-infringing alternative?

03:33:24 17 A. Yes.

03:33:25 18 Q. So you're telling me that -- you're telling the ladies  
03:33:32 19 and gentlemen of the jury that we're here, we're having  
03:33:34 20 this intense fight, and the reason for that is because,  
03:33:38 21 apparently, Wells Fargo could just spend less than  
03:33:43 22 \$3.9 million and turn it off?

03:33:44 23 A. I'm not going to opine upon what Wells Fargo will or  
03:33:48 24 will not do with its business. I'm going to give you my  
03:33:51 25 opinion as to what I think the value is of the

03:33:54 1 patents-in-suit in this litigation.

03:33:55 2 Q. But one thing we know, Dr. Villasenor says it can be

03:33:58 3 turned off whenever Wells Fargo wants. They just need to

03:34:01 4 write a check for less than \$3.8 million to their engineers

03:34:05 5 and they can turn it off, correct?

03:34:07 6 A. The cost to implement would be less than the numbers

03:34:09 7 I've calculated.

03:34:10 8 Q. But the second thing we know is that Wells Fargo has

03:34:13 9 not turned it off, correct?

03:34:15 10 A. I don't believe they have.

03:34:16 11 Q. Thank you.

03:34:18 12 THE COURT: You pass the witness?

03:34:19 13 MR. SHEASBY: I pass the witness.

03:34:20 14 THE COURT: Further direct, Ms. Williams?

03:34:23 15 MS. WILLIAMS: No, Your Honor. Thank you.

03:34:24 16 THE COURT: You may step down, Mr. Gerardi.

03:34:26 17 THE WITNESS: Thank you, Your Honor.

03:34:27 18 THE COURT: Defendant, call your next witness.

03:34:39 19 MR. MELSHEIMER: May it please the Court.

03:34:41 20 Your Honor, at this time Wells Fargo rests its case,

03:34:43 21 subject to the filings that we made earlier that Mr. Hill

03:34:46 22 discussed with the Court outside the jury's presence. But

03:34:50 23 at this time, we rest our case.

03:34:51 24 THE COURT: All right. Defendants have rested

03:34:53 25 their case-in-chief.

03:34:55 1           Does Plaintiff have a rebuttal case to present to  
03:34:57 2 the jury?

03:34:57 3           MS. GLASSER: We do, Your Honor.

03:34:58 4           THE COURT: Proceed with Plaintiff's rebuttal  
03:35:00 5 case.

03:35:00 6           MS. GLASSER: Plaintiff, USAA, in rebuttal will be  
03:35:05 7 calling two witnesses by deposition. We will be recalling  
03:35:10 8 Mr. Ajami, and that will be the last witness of the case.

03:35:15 9           The first witness that we will be calling is  
03:35:18 10 Mr. Paul Rosati, corporate representative of Wells Fargo by  
03:35:23 11 video deposition.

03:35:28 12           THE COURT: All right. Proceed with the witness  
03:35:29 13 by deposition.

03:35:31 14           MR. HILL: Your Honor, before we do that,  
03:35:33 15 Mr. Rosati was not a corporate representative in this  
03:35:35 16 deposition. I just want to correct that for the record.

03:35:38 17 He was --

03:35:39 18           THE COURT: Do we have a dispute about that,  
03:35:42 19 Ms. Glasser?

03:35:44 20           MS. GLASSER: My understanding is they had  
03:35:46 21 represented him in this case as someone who had provided  
03:35:49 22 information to the experts on behalf of Wells Fargo Bank,  
03:35:52 23 but we don't have any substantive disagreement if they want  
03:35:55 24 to call him by something different.

03:35:57 25           THE COURT: All right. Let's proceed with the

03:36:04 1 deposition.

03:36:04 2 (Videoclip played.)

03:36:04 3 QUESTION: Can you state your full name for the

03:36:05 4 record?

03:36:05 5 ANSWER: Paul Rosati.

03:36:07 6 QUESTION: Where are you employed?

03:36:08 7 ANSWER: Wells Fargo Bank.

03:36:09 8 QUESTION: Sir, you understand that the wholesale

03:36:12 9 group at Wells Fargo had a mobile remote deposit capture

03:36:19 10 system, fair?

03:36:20 11 ANSWER: I was not aware of what wholesale did or

03:36:23 12 didn't have.

03:36:24 13 QUESTION: Are you aware today?

03:36:26 14 ANSWER: Yes.

03:36:26 15 QUESTION: What are you aware of?

03:36:27 16 ANSWER: That they have a check capture product.

03:36:29 17 QUESTION: Has there been any discussions at any

03:36:31 18 time, ever, about using the wholesale group's check capture

03:36:36 19 product?

03:36:36 20 ANSWER: Not that I'm aware of.

03:36:38 21 QUESTION: Do you have any basis to conclude that

03:36:40 22 the wholesale group's check capture product would be

03:36:44 23 sufficient for the needs of retail customers that Wells

03:36:47 24 Fargo seeks to serve with its mobile remote deposit capture

03:36:51 25 system that you're in charge of?

03:36:52 1 ANSWER: I haven't looked into that.

03:36:54 2 QUESTION: Sir, do you have any facts that would

03:36:59 3 lead you to believe that it would be appropriate?

03:37:01 4 ANSWER: No.

03:37:02 5 QUESTION: Have there been any discussions at any

03:37:04 6 time -- at any point that suggested or even discussed

03:37:10 7 whether the wholesale remote deposit capture system would

03:37:14 8 be appropriate for your retail customers?

03:37:16 9 ANSWER: None that I've been involved in.

03:37:18 10 QUESTION: You joined the mobile product deposit

03:37:22 11 group at Wells Fargo in 2014, correct?

03:37:25 12 ANSWER: Yes.

03:37:25 13 QUESTION: You've been in that project for five

03:37:31 14 years, correct?

03:37:33 15 ANSWER: The product manager for five years, yes.

03:37:36 16 QUESTION: At some point after the date of joining

03:37:39 17 that product, your group examined the user interfaces that

03:37:43 18 USAA uses for its mobile check deposit system, correct?

03:37:47 19 ANSWER: Specific to manual and auto capture, and

03:37:53 20 specific to multiple check capture.

03:37:56 21 QUESTION: Before this lawsuit began, you were

03:37:58 22 aware that USAA had announced licensing initiative relating

03:38:02 23 to its mobile check deposit capture patents, correct?

03:38:06 24 ANSWER: I saw some press releases.

03:38:08 25 QUESTION: You took no steps to approach USAA

03:38:17 1 about that process, correct?

03:38:20 2 ANSWER: I read the press release. That was it.

03:38:22 3 QUESTION: You never told your superior about the

03:38:28 4 press release, correct?

03:38:28 5 ANSWER: The superiors already knew.

03:38:30 6 QUESTION: Who knew?

03:38:31 7 ANSWER: Management in general. Open press

03:38:35 8 release.

03:38:35 9 QUESTION: To be clear, you were aware that USAA

03:38:42 10 had a -- had announced that it was expecting folks to take

03:38:46 11 a license to its intellectual property if they were using

03:38:49 12 it, fair?

03:38:49 13 ANSWER: I read the press release, yes.

03:38:52 14 QUESTION: Your superior, Margot Lockwood-Stein,

03:38:54 15 was aware of that, too, correct?

03:38:56 16 ANSWER: Yes.

03:38:58 17 QUESTION: Before the initiation of this lawsuit,

03:39:00 18 did you perform any investigation as to whether any of

03:39:06 19 USAA's patents were used by Wells Fargo's system?

03:39:09 20 ANSWER: No.

03:39:09 21 QUESTION: Did you request that any individual

03:39:14 22 perform that investigation?

03:39:15 23 ANSWER: No.

03:39:15 24 QUESTION: And to be clear for the record, you are

03:39:20 25 the manager of the remote deposit capture program for Wells

03:39:26 1 Fargo from the first quarter of 2014 through the present?

03:39:29 2 ANSWER: Product manager, yes.

03:39:30 3 QUESTION: Your mobile check deposit capture

03:39:35 4 system has front end and back end aspects of it, fair?

03:39:39 5 ANSWER: Yes.

03:39:39 6 QUESTION: The back end aspects of it, after the

03:39:46 7 images are received, is sort of shared infrastructure

03:39:49 8 that's used by a number of different deposit routes,

03:39:52 9 correct?

03:39:52 10 ANSWER: Deposit's infrastructure.

03:39:53 11 QUESTION: And it's shared by a number of

03:39:55 12 different deposit routes, fair?

03:39:56 13 ANSWER: Yes.

03:39:57 14 QUESTION: One of the things -- can you think of

03:40:02 15 any technology at Wells Fargo that is comparable to mobile

03:40:06 16 check deposit?

03:40:07 17 ANSWER: Nothing comes to mind.

03:40:09 18 QUESTION: USAA is a financial services company

03:40:16 19 that serves the military and its family, fair?

03:40:20 20 ANSWER: Yes.

03:40:20 21 QUESTION: In other words, you understand that its

03:40:22 22 banking division, USAA, is a competitor of Wells Fargo,

03:40:26 23 correct?

03:40:26 24 ANSWER: Yes.

03:40:28 25 (Videoclip ends.)

03:40:32 1 THE COURT: Does that complete this witness by  
03:40:35 2 deposition?

03:40:36 3 MS. GLASSER: It does, Your Honor.

03:40:37 4 THE COURT: Call your next rebuttal witness.

03:40:39 5 MS. GLASSER: May it please the Court. USAA calls  
03:40:42 6 its final witness, Wells Fargo corporate representative  
03:40:45 7 Mr. Armin Ajami.

03:40:47 8 THE COURT: Proceed with the witness by  
03:40:48 9 deposition.

03:40:49 10 (Videoclip played.)

03:40:49 11 QUESTION: Mark as the first exhibit in order  
03:40:55 12 Exhibit 1.

03:40:55 13 Sir, I'm handing you Exhibit 1. This is the email  
03:40:58 14 that you wrote, correct?

03:40:59 15 ANSWER: Uh-huh. Let me read it. Yes, I see the  
03:41:03 16 email.

03:41:03 17 QUESTION: And this is an email that you wrote to  
03:41:05 18 your colleagues, correct?

03:41:06 19 ANSWER: It is.

03:41:07 20 QUESTION: It's relating to the mobile deposit  
03:41:09 21 system that you folks were considering launching, fair?

03:41:13 22 ANSWER: It's related to the user experience for  
03:41:18 23 mobile deposit.

03:41:18 24 QUESTION: Sir, if you can answer my question the  
03:41:22 25 way I asked it, I'd appreciate it. This is relating to the

03:41:26 1 mobile deposit product you folks were considering  
03:41:28 2 launching?

03:41:29 3 ANSWER: It's related to part of mobile deposit.

03:41:32 4 QUESTION: This email, Exhibit 1, is relating to a  
03:41:35 5 part of the mobile deposit --

03:41:37 6 ANSWER: Uh-huh.

03:41:37 7 QUESTION: -- system you were launching, fair?

03:41:39 8 ANSWER: Yes.

03:41:39 9 QUESTION: And it says that you're leveraging the  
03:41:43 10 learnings that you derived from, amongst other entities,  
03:41:46 11 USAA, fair?

03:41:47 12 ANSWER: In the design of the product. In the  
03:41:53 13 design of the user experience.

03:41:55 14 QUESTION: Sir, if you could answer my question  
03:41:57 15 fairly, yes or no, I -- I would appreciate --

03:42:00 16 ANSWER: Could you restate your question? Sorry.

03:42:03 17 QUESTION: Sure. This is an email that you wrote  
03:42:05 18 in 2010 regarding the mobile remote deposit capture system  
03:42:09 19 that Wells Fargo was launching.

03:42:09 20 ANSWER: Uh-huh.

03:42:11 21 QUESTION: You stated that you were planning on  
03:42:13 22 leveraging design learnings from USAA, fair?

03:42:16 23 ANSWER: Yes, for design.

03:42:17 24 QUESTION: Why don't we start there. When was the  
03:42:20 25 project team engaged to develop mobile check deposit?

03:42:24 1                   ANSWER: In mid to late 2009 is the first time we  
03:42:27 2 started putting resources to look at the opportunity.

03:42:30 3                   QUESTION: And who made that decision?

03:42:32 4                   ANSWER: I did.

03:42:35 5                   QUESTION: Sir, to be clear, you don't recall if  
03:42:38 6 you were aware that USAA had launched a mobile check  
03:42:43 7 deposit system at the time you were planning on launching  
03:42:47 8 one for Wells Fargo; is that your testimony?

03:42:49 9                   ANSWER: At the time -- yeah, I just -- I don't  
03:42:54 10 remember. I know we found out about it later. I don't  
03:42:57 11 know at the time when we were about to make a decision to  
03:42:59 12 start looking at it in late 2009, whether USAA was in the  
03:43:04 13 market or not.

03:43:05 14                   I'm not clear on your definition of that term. If  
03:43:08 15 you're talking about the user experience, my team looked at  
03:43:11 16 the user experience of whoever was in the marketplace at  
03:43:14 17 the time, including USAA.

03:43:14 18                   QUESTION: Sir, your team examined USAA's  
03:43:22 19 Mobile@Deposit [sic] check deposit system, fair?

03:43:26 20                   ANSWER: The user experience of that system, yeah,  
03:43:30 21 we looked at it.

03:43:31 22                   QUESTION: You downloaded the app, correct?

03:43:33 23                   ANSWER: Actually, I don't have firsthand  
03:43:36 24 knowledge of who downloaded the app, but we -- we may have  
03:43:39 25 gotten it through a third-party research firm that may have

03:43:43 1 produced some information regarding -- it was publicly  
03:43:48 2 available information about USAA's system.

03:43:50 3                   QUESTION: Sir, Wells Fargo examined USAA's mobile  
03:43:58 4 check deposit application while it was designing its  
03:44:01 5 system, yes or no?

03:44:02 6                   ANSWER: Again, can you define examined? Because  
03:44:07 7 what I'm saying is we looked at the user experience. So if  
03:44:12 8 that's your definition of examined, then that's fine, but I  
03:44:15 9 don't know what you mean by examined.

03:44:18 10                  QUESTION: You wanted people who used mobile  
03:44:21 11 banking to continue to utilize ATMs and stores for check  
03:44:25 12 deposits; is that correct?

03:44:26 13                  ANSWER: Our position -- our view -- our viewpoint  
03:44:32 14 was customers should choose whatever channel they want to  
03:44:35 15 choose that's most convenient for them. Some people are  
03:44:38 16 going to want to come into the stores and branches, visit  
03:44:41 17 the ATM. For some people, self-service using a digital  
03:44:44 18 channel like mobile makes the most sense. So ultimately,  
03:44:47 19 it's customer choice. We weren't forcing or incenting  
03:44:51 20 anyone to use a mobile solution.

03:44:53 21                  QUESTION: Now, at the time of development of a  
03:45:14 22 mobile check deposit system at Wells Fargo, Wells Fargo had  
03:45:19 23 available to it a pre-existing Desktop Deposit solution,  
03:45:24 24 fair?

03:45:24 25                  ANSWER: Yes.

03:45:25 1           QUESTION: Your presentation concludes that that's  
03:45:27 2 not a commercially viable option for the vast number of  
03:45:32 3 consumers who your mobile product would be addressed to,  
03:45:35 4 fair?

03:45:35 5           ANSWER: Yes, for the retail bank, the retail side  
03:45:39 6 of the business, we looked at our desktop solution, and  
03:45:42 7 because that used a scanner solution, we didn't feel that  
03:45:45 8 was an appropriate use for sort of the consumer segment.  
03:45:52 9 That was -- that was tailored to a very small portion of  
03:45:55 10 the small business customer base that Wells Fargo had.

03:45:56 11           QUESTION: So the answer to my question is yes?

03:45:58 12           ANSWER: Yes.

03:45:58 13           QUESTION: You did not even consider those as  
03:46:01 14 potential commercially viable alternatives when you were  
03:46:03 15 developing the mobile deposit product?

03:46:08 16           And as to the small business solution --

03:46:08 17           ANSWER: Right.

03:46:10 18           QUESTION: -- you did consider that, and you  
03:46:12 19 concluded as well that that would not be commercially  
03:46:15 20 viable for a number of reasons.

03:46:15 21           ANSWER: Yeah. We worked in the -- we worked in  
03:46:19 22 partnership with the team that managed that product or  
03:46:22 23 service. So they had a lot of expertise in the area. We  
03:46:26 24 jointly agreed that it was not -- using a desktop scanner  
03:46:30 25 solution was not viable for a large retail consumer base,

03:46:33 1 so, yes.

03:46:34 2           QUESTION: You had a very particular criteria for

03:46:37 3 choosing the type of mobile deposit system that you were

03:46:40 4 going to use, fair?

03:46:41 5           ANSWER: That's fair.

03:46:41 6           QUESTION: You wanted one that was going to

03:46:43 7 provide the simplest experience possible, correct?

03:46:45 8           ANSWER: That's correct.

03:46:45 9           QUESTION: You wanted one that would provide the

03:46:47 10 high -- the lowest rate of exceptions and rejected checks,

03:46:51 11 correct?

03:46:51 12           ANSWER: I -- yes. I think generally speaking,

03:46:54 13 yes.

03:46:55 14           QUESTION: You told your bosses that if they

03:47:05 15 adopted mobile check deposit, it was going to cost less for

03:47:08 16 deposits to occur than if someone used a teller or an ATM,

03:47:12 17 fair?

03:47:12 18           ANSWER: What we said is the marginal costs of

03:47:16 19 taking a check in the mobile channel is definitely lower

03:47:19 20 than the ATM and the teller line. But then -- but then

03:47:23 21 we -- when we spoke to internal teams, there was -- they --

03:47:27 22 there was discussion, and we -- there was no agreement

03:47:34 23 there would actually be cost savings to the bottom line

03:47:37 24 because you're not -- the teller is still in the branch,

03:47:40 25 right? So that's why it's a channel optimization story,

03:47:43 1 that you're freeing up a teller time to do other things  
03:47:46 2 versus taking the cost, right? Because the cost in the  
03:47:49 3 teller line is a cost to the human, right? Their average  
03:47:53 4 salary. How long does it take, right?

03:47:57 5           QUESTION: Who at Wells Fargo had knowledge of  
03:47:59 6 USAA's remote deposit services before this litigation was  
03:48:06 7 initiated?

03:48:07 8           ANSWER: Right. And so I think we define remote  
03:48:11 9 deposit services from USAA both as desktop and their mobile  
03:48:14 10 solutions.

03:48:14 11           QUESTION: Okay. Let's start there.

03:48:16 12           ANSWER: What's the definition? Is it both?

03:48:19 13           QUESTION: Let's do this: Who at Wells Fargo had  
03:48:24 14 knowledge of USAA's mobile deposit solutions before the  
03:48:29 15 initiation of this lawsuit?

03:48:30 16           ANSWER: Right. I would, and the people on my  
03:48:32 17 team would have, as well, who worked on mobile deposit. We  
03:48:36 18 included it, right, in our strategy decks. So it was  
03:48:41 19 listed that USAA was in the market with a mobile remote  
03:48:47 20 deposit solution, as well.

03:48:49 21           Do you want to list all the names? There's a lot  
03:48:51 22 of people.

03:48:52 23           QUESTION: As Wells Fargo's corporate  
03:48:53 24 representative, who were the individuals at Wells Fargo who  
03:48:56 25 were involved in launching Wells's mobile deposit system

03:49:01 1 who were familiar with USAA's mobile deposit system?

03:49:03 2 ANSWER: Who were aware that -- yeah, for mobile  
03:49:07 3 deposit. So, generally, it would be on the business side.

03:49:10 4 So it would be my team, Armin Ajami, Justin Mehta, some  
03:49:14 5 folks. Pankaj Parekh, the project manager, would know.

03:49:22 6 Arah Erickson would know. Secil Watson would know.

03:49:25 7 And then we had other business teams involved. So  
03:49:28 8 the team that managed Desktop Deposit would also know. So  
03:49:31 9 that would be Amity Curry who's listed here. Her boss at  
03:49:37 10 the time was Margot Lockwood-Stein. So she would be aware.  
03:49:39 11 And her boss was Ken Dennett, as well.

03:49:42 12 So I think on the business side, that core team  
03:49:45 13 would -- would definitely know. And then I think then  
03:49:52 14 everyone who received the socialization deck -- because we  
03:49:56 15 did talk about who else was in the marketplace, whether  
03:49:59 16 it's other banks or USAA. So they would have seen that, as  
03:50:01 17 well.

03:50:02 18 QUESTION: Do this perhaps in a more efficient  
03:50:04 19 way. So I'm marking as the next exhibit in order,  
03:50:08 20 Exhibit 8, which is a 2010 document entitled Mobile Remote  
03:50:13 21 Deposit Capture Pilot, Version 0.4.

03:50:22 22 So this document discusses USAA's systems,  
03:50:26 23 correct?

03:50:26 24 ANSWER: This document provides a link to USAA's  
03:50:37 25 mobile deposit product page. This is publicly available

03:50:41 1 information, and also provides a link to a YouTube demo  
03:50:44 2 video of the -- of the product that USAA --  
03:50:46 3 QUESTION: So let's --  
03:50:48 4 ANSWER: -- provided.  
03:50:49 5 QUESTION: -- let's try do some level setting.  
03:50:51 6 ANSWER: Sure.  
03:50:51 7 QUESTION: Mobile Remote Deposit Capture Pilot,  
03:50:56 8 this document, Exhibit 8, is sort of the baseline of what  
03:50:59 9 the goals were for mobile check deposit, fair?  
03:50:59 10 ANSWER: Fair, yeah.  
03:51:00 11 QUESTION: And in this sort of baseline document,  
03:51:03 12 which is listing all these people, one of the references  
03:51:06 13 that you cite to, you actually cite to USAA's  
03:51:11 14 Deposit@Mobile product page --  
03:51:11 15 ANSWER: Uh-huh.  
03:51:12 16 QUESTION: -- and you cite to USAA's demo video?  
03:51:16 17 ANSWER: Right.  
03:51:17 18 QUESTION: Correct?  
03:51:17 19 ANSWER: Correct.  
03:51:20 20 QUESTION: And so when you were planning from this  
03:51:24 21 foundational stage about mobile check deposit, you folks  
03:51:27 22 were not just aware of the USAA system, you were actually  
03:51:32 23 sending to your teams the links for them to go look at the  
03:51:36 24 USAA system as it was publicly available, fair?  
03:51:40 25 ANSWER: Yeah, publicly available.

03:51:42 1           QUESTION: That was a yes?

03:51:44 2           ANSWER: Yes, yeah.

03:51:45 3           QUESTION: Sir, the only commercially available  
03:51:48 4 system that you point to in your foundation document from  
03:51:52 5 2010, Exhibit 8, was the USAA system in the references  
03:51:58 6 section, correct?

03:51:59 7           ANSWER: Let me look at this document. Because  
03:52:03 8 this is the -- the timing of this document is after another  
03:52:06 9 bank had gone nationwide with their rollout. So I know we  
03:52:11 10 were looking at other things in the marketplace in  
03:52:13 11 addition, but perhaps in this document -- just let me see  
03:52:17 12 if there's any reference to this other launch that was out  
03:52:19 13 there at the time.

03:52:21 14           Right. So, yes, in this document, USAA is the one  
03:52:26 15 that's listed, as well as Mitek. But USAA is the one  
03:52:30 16 that's commercially -- I think that's your question, right?  
03:52:33 17 Is commercially viable, yeah.

03:52:35 18           QUESTION: So in July of 2010, you formally  
03:52:37 19 launched a program for mobile check deposit at Wells Fargo,  
03:52:41 20 fair?

03:52:41 21           ANSWER: In July 2000 -- yes.

03:52:43 22           QUESTION: And in August of 2010, when you're  
03:52:45 23 sending around the foundational document, the only  
03:52:48 24 commercially available mobile check deposit system that was  
03:52:51 25 circulated to the team was links to the USAA system, fair?

03:52:56 1 ANSWER: In this document, yes.

03:52:58 2 QUESTION: Okay. So we're trying to collect

03:53:05 3 information that Wells Fargo had on USAA's patent holdings

03:53:13 4 in the mobile remote deposit space. And as the corporate

03:53:18 5 representative, you are pointing to the fact that USAA

03:53:20 6 announced that it had patent holdings in the mobile deposit

03:53:26 7 space and was starting a licensing program, correct?

03:53:28 8 ANSWER: Yes.

03:53:29 9 QUESTION: And Wells Fargo was aware of that

03:53:30 10 announcement, correct?

03:53:32 11 ANSWER: Wells Fargo became aware of that

03:53:33 12 announcement at some point. I don't -- yeah.

03:53:35 13 QUESTION: It became aware of that announcement

03:53:37 14 before this lawsuit was filed, correct?

03:53:39 15 ANSWER: Yes.

03:53:39 16 QUESTION: Now, Wells Fargo also discussed with

03:54:00 17 USAA employees USAA's mobile system before Wells Fargo

03:54:06 18 launched its mobile system, correct?

03:54:09 19 ANSWER: I'm sorry. You're saying Wells Fargo

03:54:13 20 spoke to USAA employees about their system before we

03:54:17 21 launched in 2012?

03:54:23 22 QUESTION: Yes.

03:54:23 23 ANSWER: So we were aware -- yeah, I think we

03:54:26 24 attended conferences -- I attended conferences personally

03:54:29 25 where there were USAA representatives there who were

03:54:32 1 speaking about their mobile deposit capture solution, the  
03:54:36 2 results, customer experience, et cetera. These were  
03:54:41 3 specifically like trade shows, conferences.

03:54:43 4           QUESTION: Sure.

03:54:44 5           ANSWER: And Jeff Dennis -- I think it's Neff  
03:54:49 6 Hudson is another person -- were speaking at the time. I  
03:54:52 7 don't recall speaking to them directly, but I was in the  
03:54:55 8 audience when they were speaking about their own solution.

03:54:58 9           QUESTION: So as Wells Fargo's corporate  
03:55:01 10 representative, you're testifying that on multiple  
03:55:04 11 occasions before Wells Fargo launched its product, Wells  
03:55:07 12 Fargo employees attended public presentations, industry  
03:55:11 13 conferences, where USAA was discussing its Mobile@Deposit  
03:55:18 14 product?

03:55:19 15           ANSWER: Yes.

03:55:19 16           QUESTION: In fact, by 2013, there was an  
03:55:22 17 indication that bringing folks into the mobile banking  
03:55:26 18 sphere, getting people to use your mobile app, which has  
03:55:28 19 lots of different products on it, was a benefit, an  
03:55:32 20 ecosystem benefit, fair?

03:55:36 21           ANSWER: I would say it was a way to deepen the  
03:55:39 22 relationship with customers. So by having mobile features,  
03:55:43 23 they would interact with the bank more often, a  
03:55:46 24 self-service channel. And so that could have additional  
03:55:49 25 benefits. We weren't exactly sure, but it was part of an

03:55:52 1 entire -- you call it "ecosystem." Would probably say  
03:55:56 2 probably value proposition the bank provides. All the  
03:55:59 3 digital services we have, including mobile and mobile  
03:56:01 4 deposit, are part of that value proposition.

03:56:03 5           QUESTION: And mobile check deposit is one of the  
03:56:08 6 elements that makes you a leader in the technology sphere  
03:56:13 7 in banking, fair?

03:56:15 8           ANSWER: Yeah, I would say from a mobile -- yeah,  
03:56:17 9 from a technology perspective, mobile deposit's one of  
03:56:24 10 the -- it's not the only thing, but it's definitely one of  
03:56:24 11 the features that makes Wells Fargo a leader.

03:56:26 12           QUESTION: In fact, your presentations describe it  
03:56:29 13 as table stakes, required to compete, fair?

03:56:34 14           ANSWER: We evolve, yeah, but towards -- before we  
03:56:37 15 launch, yes, we, had that point of view that it was  
03:56:40 16 becoming table stakes, and mobile deposit was a feature  
03:56:42 17 that customers were starting to demand.

03:56:45 18           QUESTION: Well, you do have some things to base  
03:56:47 19 it on. For example, you know that mobile check deposit  
03:56:53 20 significantly shifts users to the lowest cost deposit  
03:57:02 21 channel available at the bank, fair?

03:57:04 22           ANSWER: Right. Mobile deposit takes deposits out  
03:57:07 23 of other channels and moves to the self-service channel,  
03:57:11 24 yes, yeah.

03:57:12 25           QUESTION: Out of much more expensive other

03:57:14 1 channels, correct?

03:57:15 2 ANSWER: Yes.

03:57:18 3 QUESTION: And you also know that mobile check

03:57:24 4 deposit is a table stakes requirement in today's banking

03:57:28 5 environment, fair?

03:57:29 6 ANSWER: Mobile deposit as a whole, yeah, it's now

03:57:33 7 been established definitely as table stakes.

03:57:37 8 QUESTION: And you also know that mobile deposit

03:57:40 9 is a way of making your customers stickier and more engaged

03:57:45 10 with you, fair?

03:57:46 11 ANSWER: I think mobile deposit is one of many

03:57:51 12 ways we try and engage customers.

03:57:52 13 QUESTION: Sir, in your presentations to

03:57:55 14 executives in 2011 and 2013, you quoted customers who said

03:57:59 15 they're going to leave Wells Fargo --

03:58:00 16 ANSWER: Sure.

03:58:01 17 QUESTION: -- if you don't offer mobile check

03:58:04 18 deposit, correct?

03:58:04 19 ANSWER: Correct. And we get that all the time

03:58:07 20 for a lot of features. We don't know if they actually

03:58:10 21 leave or not, but it was bubbling up as a service people

03:58:13 22 wanted to have.

03:58:14 23 QUESTION: It was not bubbling up. It was the

03:58:16 24 No. 1 pain point among your customers in the mobile space

03:58:19 25 when you launched the feature.

03:58:21 1 ANSWER: Right.

03:58:24 2 (Videoclip ends.)

03:58:24 3 THE COURT: Does that complete this deposition

03:58:26 4 witness?

03:58:26 5 MS. GLASSER: It does, Your Honor.

03:58:28 6 THE COURT: Does this complete Plaintiff's

03:58:30 7 rebuttal case?

03:58:31 8 MS. GLASSER: It does, Your Honor.

03:58:32 9 THE COURT: Does -- subject to final instructions

03:58:34 10 and final argument, does the Plaintiff rest and close?

03:58:37 11 MS. GLASSER: We do. Thank you, Your Honor.

03:58:39 12 THE COURT: Subject to final instructions and

03:58:40 13 final arguments, does the Defendant rest and close?

03:58:43 14 MR. HILL: Yes, Your Honor. Also, subject to

03:58:45 15 matters under Rule 50 which we would like to note and

03:58:48 16 preserve for the record which we know the Court will take

03:58:51 17 up later, we do rest and close.

03:58:53 18 THE COURT: All right. Ladies and gentlemen of

03:58:54 19 the jury, that means you have heard all the evidence in

03:58:56 20 this case.

03:58:58 21 There are certain matters the Court has to take up

03:59:03 22 with counsel in preparation for me giving to you my final

03:59:07 23 instructions on the law, which you've heard referred to as

03:59:10 24 the Court's charge to the jury, followed by counsel's

03:59:15 25 closing arguments. There are things that have to be taken

03:59:17 1 up between counsel and the Court before we're ready to  
03:59:20 2 proceed to that.

03:59:21 3 The good news is that that means you get to go  
03:59:25 4 home at 4:00 o'clock today. The not bad news is I still  
03:59:32 5 need you back in the morning, and I'd like to have you back  
03:59:34 6 at 8:30 ready to go, as we've been doing all week.

03:59:37 7 If things go as I anticipate the rest of the  
03:59:41 8 evening -- and we may be up here a good while, but that's  
03:59:45 9 no concern of yours -- if things go as I anticipate, then  
03:59:51 10 when you're back in the morning and I bring you back into  
03:59:53 11 the courtroom first thing, I'll proceed to give you my  
03:59:57 12 final instructions on the law that you're to apply in this  
04:00:00 13 case. And then counsel for Plaintiff and Defendant will  
04:00:02 14 present their closing arguments.

04:00:04 15 And after you've heard my final instructions and  
04:00:06 16 counsel's closing arguments, then I will direct you to  
04:00:10 17 retire to the jury room and to deliberate on the verdict in  
04:00:14 18 this case. I will send back to you in the jury room eight  
04:00:19 19 written copies of those final instructions I'm going to  
04:00:21 20 give you.

04:00:22 21 So while I'm giving them to you orally in the  
04:00:26 22 morning, you can make notes if you want to, but you are not  
04:00:31 23 required to and I want you to know you'll have your own  
04:00:34 24 individual written copies of those instructions to review  
04:00:36 25 in the jury room while you deliberate.

04:00:38 1 I will also send back to the jury room with you  
04:00:40 2 one clean copy of the verdict form with the questions in  
04:00:44 3 there that you will be asked to answer on a unanimous  
04:00:46 4 basis.

04:00:47 5 So with that, ladies and gentlemen, I'm going to  
04:00:49 6 excuse you for the day. Follow all the instructions I've  
04:00:52 7 given you. We are getting close to the end of the process.  
04:00:56 8 It would be a travesty if any of my instructions were  
04:01:01 9 violated and what we've done so far was placed in jeopardy.  
04:01:04 10 Don't discuss the case with anyone. Don't discuss the case  
04:01:07 11 with each other.

04:01:08 12 Please leave your notebooks closed on the table in  
04:01:10 13 the jury room. Travel safely, and we'll see you in the  
04:01:13 14 morning.

04:01:13 15 The jury is excused for the evening.

04:01:15 16 COURT SECURITY OFFICER: All rise.

04:01:20 17 (Jury out.)

04:01:36 18 THE COURT: Counsel, we will take a short recess,  
04:01:38 19 after which I'll return to the bench, and I'll take up  
04:01:43 20 motions either party wishes to offer under Rule 50(a) of  
04:01:46 21 the Federal Rules of Civil Procedure.

04:01:50 22 After we've completed the 50(a) process, I've  
04:01:54 23 heard your arguments, which I hope will be succinct, and  
04:01:57 24 I've given you my rulings, then I will conduct an informal  
04:02:01 25 charge conference in chambers.

04:02:02 1 I've been working on the latest submission of the  
04:02:06 2 parties' proposed charge and verdict form. I'm more  
04:02:09 3 optimistic about us being able to get through that in a  
04:02:09 4 reasonable time than I was yesterday.

04:02:12 5 After we've completed an informal charge  
04:02:16 6 conference in which counsel -- any and all counsel who've  
04:02:21 7 appeared in the case are welcome to participate in, then  
04:02:23 8 I'll conduct a formal charge conference on the record. And  
04:02:25 9 having completed the formal charge conference, I expect to  
04:02:28 10 recess at that point and reconvene in the morning at 8:30  
04:02:31 11 and proceed, as I've indicated to the jury.

04:02:33 12 Those of you that will be presenting closing  
04:02:36 13 arguments for your respective sides are not required to  
04:02:40 14 participate in the informal or formal charge conference or  
04:02:43 15 the 50(a) conference. If you'd like to begin preparing or  
04:02:47 16 continuing your already begun preparations for closing  
04:02:51 17 arguments, as long as each side is adequately staffed,  
04:02:54 18 which I have no concerns about, you're free to be elsewhere  
04:02:57 19 and use that time for other purposes.

04:02:59 20 Are there questions before we recess?

04:03:02 21 MR. SHEASBY: Your Honor, there is one question  
04:03:04 22 which is, are we going to use the same procedure for  
04:03:06 23 closings as last time, which is all slides must be  
04:03:09 24 disclosed, including all trial transcript testimony that's  
04:03:13 25 going to be used, so we can hash out objections as to

04:03:17 1 whether --

04:03:17 2 THE COURT: I don't want objections in the middle

04:03:19 3 of closing arguments. As I often say to the jury, closing

04:03:23 4 arguments are, in my view, the most serious part of a very

04:03:27 5 serious process. If they can be avoided, I want to find a

04:03:31 6 way to avoid them. We'll talk about that after the recess.

04:03:35 7 MR. SHEASBY: Thank you.

04:03:36 8 THE COURT: Anything further?

04:03:37 9 Court stands in recess.

04:03:40 10 COURT SECURITY OFFICER: All rise.

04:03:40 11 (Recess.)

04:34:44 12 (Jury out.)

04:34:44 13 COURT SECURITY OFFICER: All rise.

04:34:46 14 THE COURT: Be seated, please.

04:38:10 15 All right. Counsel, we'll proceed at this time to

04:38:24 16 take up any motions either party wishes to offer under Rule

04:38:31 17 50(a) of the Federal Rules of Civil Procedure.

04:38:33 18 What I'd like is whoever is going to speak for

04:38:36 19 Plaintiff and Defendant both go to the podium.

04:38:39 20 I'd next like to identify substantively or

04:38:44 21 topically the areas where each party believes there's an

04:38:45 22 appropriate motion under 50(a) to be offered.

04:38:46 23 After those have been identified, then I'll give

04:38:49 24 you directions as to how I want to receive argument.

04:38:52 25 So who's going to speak for Plaintiff?

04:38:55 1 Mr. Rowles?

04:38:58 2 Who's going to speak for Defendant?

04:39:01 3 MR. MCCULLOUGH: Your Honor, we're going to split  
04:39:03 4 it on issues.

04:39:03 5 THE COURT: Well, for right now, you're it.

04:39:03 6 MR. MCCULLOUGH: Yes.

04:39:03 7 THE COURT: All right. What areas topically or  
04:39:05 8 substantively does Plaintiff wish to urge the Court to  
04:39:09 9 consider judgment as a matter of law under Rule 50(a)?

04:39:13 10 MR. ROWLES: Thank you, Your Honor. There are  
04:39:14 11 five issues; one related to infringement, willful  
04:39:17 12 infringement, anticipation, written description, and  
04:39:24 13 damages.

04:39:25 14 THE COURT: All right. What's Defendant's  
04:39:37 15 position on matters appropriate for judgment as a matter of  
04:39:40 16 law under Rule 50(a)?

04:39:42 17 MR. MCCULLOUGH: Your Honor, we'll be moving for  
04:39:45 18 judgment as a matter of law on infringement, willful  
04:39:47 19 infringement, written description, anticipation, and  
04:39:51 20 damages.

04:39:56 21 THE COURT: All right. Anything else?

04:39:58 22 MR. MCCULLOUGH: Your Honor --

04:40:00 23 THE COURT: Go ahead.

04:40:01 24 MR. MCCULLOUGH: -- one other issue, if I may.

04:40:05 25 So we understand the Court's ruling in the prior

04:40:07 1 case with respect to 101, that it is not a proper subject  
04:40:07 2 for a 50(a) motion. We assume the Court's ruling would be  
04:40:11 3 the same here, but I just want to note to the extent --

04:40:13 4 THE COURT: If you urge it, you'll get my ruling,  
04:40:16 5 but in all likelihood it will be the same.

04:40:18 6 MR. MCCULLOUGH: I would just like to note for the  
04:40:20 7 record, to preserve and avoid any possible waiver argument,  
04:40:25 8 we'll move under Section 101.

04:40:27 9 THE COURT: As Rule 50(a) clearly says, if a party  
04:40:41 10 has been fully heard on an issue during a jury trial and  
04:40:45 11 the Court finds a reasonable jury would not have a legally  
04:40:48 12 sufficient evidentiary basis to find for the party on that  
04:40:51 13 issue, the Court may grant a motion for judgment as a  
04:40:54 14 matter of law.

04:40:54 15 Patentability is not an issue that either party  
04:40:58 16 has been fully heard on as a part of this jury trial. The  
04:41:00 17 Court's not going to entertain a motion under Rule 50(a)  
04:41:04 18 related to Section 101 patentability.

04:41:06 19 Any request by Defendant to that -- in that regard  
04:41:09 20 is denied.

04:41:10 21 MR. MCCULLOUGH: Understand, Your Honor.

04:41:11 22 THE COURT: All right. Have I fully heard from  
04:41:13 23 both Plaintiff and Defendant otherwise?

04:41:15 24 MR. ROWLES: You have, Your Honor.

04:41:17 25 MR. MCCULLOUGH: Yes, Your Honor.

04:41:17 1                 THE COURT: All right. These appear to be mirror  
04:41:21 2 image issues. I see no reason why we can't combine  
04:41:24 3 argument on each of these five categories and hear from  
04:41:27 4 both parties at the same time.

04:41:28 5                 Let's start with the issue of infringement. I'll  
04:41:32 6 hear first from Plaintiff, and then I'll hear from  
04:41:34 7 Defendant.

04:41:36 8                 And I understand there are several members of the  
04:41:38 9 Defendant's trial team that will divide these categories  
04:41:42 10 up. That's no problem. And when the Court takes up an  
04:41:46 11 issue that you've been assigned, simply step to the podium  
04:41:50 12 and participate in the argument.

04:41:51 13                 MR. MCCULLOUGH: Thank you, Your Honor.

04:41:52 14                 THE COURT: What's Plaintiff's argument -- brief  
04:41:54 15 argument on infringement under Rule 50(a)?

04:41:57 16                 MR. ROWLES: Thank you, Your Honor.

04:41:58 17                 Plaintiff moves for -- for judgment as a matter of  
04:42:00 18 law that no reasonable jury could find that Defendant has  
04:42:04 19 not literally infringed Claims 12, 13, 14, 20, 22, and 30  
04:42:11 20 of the '681 patent, and Claims 1, 3, 11 through 14, and 22  
04:42:17 21 of the '605 patent.

04:42:19 22                 Wells Fargo only disputes whether the Wells Fargo  
04:42:23 23 Mobile Deposit system practices one element of the asserted  
04:42:26 24 claims of the '681 patent.

04:42:28 25                 And Wells Fargo does not dispute that the Wells

04:42:32 1 Fargo Mobile Deposit system practices every single element  
04:42:34 2 of the asserted claims of the '605 patent.

04:42:39 3                 The testimony of Professor Conte has shown that  
04:42:41 4 the Wells Fargo Mobile Deposit system practices each and  
04:42:44 5 every element of the asserted claims, including the  
04:42:47 6 disputed element for the '681 patent. No reasonable jury  
04:42:50 7 could conclude that the only element disputed by Wells  
04:42:52 8 Fargo is not literally present in the accused system.

04:42:55 9                 The testimony of Professor Conte has also shown  
04:42:58 10 that Wells Fargo makes the Wells Fargo Mobile Deposit  
04:43:02 11 system accused of infringement and uses it in an infringing  
04:43:05 12 manner.

04:43:07 13                 Therefore, USAA respectfully requests that the  
04:43:09 14 Court enter judgment in its favor on the issue of  
04:43:12 15 infringement and hold the Defendants have infringed the  
04:43:15 16 asserted claims of the '681 patent and the '605 patent.

04:43:19 17                 THE COURT: All right. Let me hear from Defendant  
04:43:23 18 on this same issue.

04:43:25 19                 MR. MCCULLOUGH: Your Honor, Defendant moves for  
04:43:27 20 judgment as a matter of law because there is not  
04:43:29 21 substantial evidence of direct infringement of any asserted  
04:43:34 22 claims.

04:43:34 23                 First, for the '681 patent, there is not  
04:43:36 24 substantial evidence that the accused system meets the  
04:43:39 25 confirming limitation which appears in each claim. The

04:43:43 1 claims require and all experts agree that the confirming  
04:43:47 2 step is performed by the mobile device.

04:43:49 3 It is also -- each of the confirming steps also  
04:43:52 4 recite that OCR performed on the check amount. It is  
04:43:55 5 undisputed that OCR, the amount, only occurs at the server.

04:44:00 6 Dr. Villasenor testified as such, and Dr. Conte  
04:44:03 7 did not provide any contrary evidence. Because of that,  
04:44:08 8 there's not substantial evidence to support that the  
04:44:10 9 confirming limitation is met.

04:44:11 10 Furthermore, Dr. Conte admitted that the only  
04:44:14 11 device that is deciding whether or not the check deposit  
04:44:18 12 can go forward is the server. Thus, this is -- the server  
04:44:22 13 is the element that is confirming the deposit can go  
04:44:26 14 forward and not the mobile device. There is no evidence in  
04:44:28 15 the record to the contrary.

04:44:30 16 Dr. Villasenor's testimony is consistent on this  
04:44:37 17 respect. And thus, there is not substantial evidence to  
04:44:37 18 support that the accused product meets the confirming  
04:44:39 19 limitation of each of the '681 patent claims.

04:44:44 20 Further --

04:44:45 21 THE COURT: All right. Go ahead.

04:44:46 22 MR. MCCULLOUGH: Furthermore, we would move for  
04:44:49 23 judgment as a matter of law because there is not  
04:44:50 24 substantial evidence to support that Wells Fargo is liable  
04:44:53 25 for infringement of the system claims.

04:44:57 1 USAA has not presented or proffered sufficient or  
04:45:00 2 substantial evidence to support a finding that Wells Fargo  
04:45:02 3 is liable under the doctrine of divided infringement.

04:45:06 4 Each claim that USAA has asserted is directed to a  
04:45:10 5 system. And for each claim, Dr. Conte's infringement  
04:45:12 6 analysis accuses the system involving steps performed both  
04:45:16 7 on the user's device, the smartphone, as well as steps  
04:45:20 8 occurring on Wells Fargo's servers.

04:45:22 9 There is no evidence that Wells Fargo makes,  
04:45:25 10 sells, offers to sell, imports, or provides smartphones,  
04:45:29 11 and there's evidence they do not.

04:45:31 12 Dr. Conte did not testify or offer evidence that  
04:45:35 13 Wells Fargo sells, offers to sell, or imports the claimed  
04:45:39 14 inventions. And, thus, there's no evidence to support a  
04:45:42 15 verdict of infringement under those theories.

04:45:44 16 With respect to making the invention, no  
04:45:47 17 reasonable jury could find that Wells Fargo makes the  
04:45:49 18 accused system because there is no evidence that Wells  
04:45:52 19 Fargo combines all of the claim elements as required by  
04:45:58 20 Centillion.

04:45:58 21 Dr. Conte's testimony on this point is  
04:46:00 22 insufficient. Every asserted claim recites either a mobile  
04:46:04 23 device or a portable device, and Dr. Conte did not testify  
04:46:07 24 or present evidence that Wells Fargo combines the mobile  
04:46:10 25 device with the system.

04:46:10 1 As to infringement by use of the accused system,  
04:46:14 2 Dr. Conte did not testify or provide sufficient evidence  
04:46:17 3 that Wells Fargo uses the claimed invention. Centillion  
04:46:23 4 requires that the direct infringer both control the system  
04:46:26 5 as a whole and benefit from each and every element of the  
04:46:28 6 claimed system, as interpreted by the Federal Circuit in  
04:46:31 7 Intellectual Ventures versus Motorola.

04:46:33 8 Dr. Conte admitted he performs no  
04:46:38 9 element-by-element analysis of benefits of the claims.  
04:46:41 10 USAA's only other expert, Mr. Weinstein, admitted that he  
04:46:44 11 valued features not in the claims.

04:46:47 12 USAA has adduced no other -- no other evidence of  
04:46:50 13 benefits on an element-by-element basis.

04:46:53 14 Benefit from the system as a whole is not enough  
04:46:56 15 under the law. Again, that's the Intellectual Ventures  
04:46:59 16 case. And, thus, there is not substantial evidence to  
04:47:03 17 support a finding of infringement.

04:47:06 18 Finally, one additional point. Even assuming the  
04:47:11 19 Akamai standard applies, as USAA has argued at certain  
04:47:16 20 points in this case, the evidence would be insufficient to  
04:47:19 21 support a finding of direction or control by Wells Fargo.

04:47:21 22 THE COURT: All right. Well, I've heard argument  
04:47:23 23 from both Plaintiff and Defendant on these competing  
04:47:26 24 motions under Rule 50(a).

04:47:27 25 I will note for the record, the Court does not

04:47:33 1 view the appropriate standard as substantial evidence, but  
04:47:37 2 no legally sufficient basis -- evidentiary basis upon which  
04:47:41 3 the jury could rule otherwise.

04:47:43 4 Nonetheless, having heard the argument from both  
04:47:46 5 Plaintiff's motion for judgment as a matter of law  
04:47:54 6 on the issue of infringement is denied, as is Defendant's  
04:47:54 7 motion for judgment as a matter of law regarding  
04:47:55 8 infringement.

04:47:56 9 I'll next take up the parties' competing motions  
04:48:02 10 under 50(a) regarding the issue of willful infringement or  
04:48:06 11 willfulness.

04:48:06 12 Let me hear from Defendant first this time, and  
04:48:08 13 then Plaintiff.

04:48:09 14 MS. MARCOM: Good afternoon, Your Honor.

04:48:13 15 THE COURT: Let me ask counsel to identify  
04:48:15 16 themselves on the record since most of you probably haven't  
04:48:17 17 participated in the trial so far.

04:48:19 18 MS. MARCOM: Kate Marcom for Defendant, Wells  
04:48:22 19 Fargo.

04:48:22 20 THE COURT: At least participated on the record.

04:48:24 21 Go ahead.

04:48:25 22 MS. MARCOM: Judgment as a matter of law for  
04:48:27 23 Defendant is warranted on Plaintiff's claims of willful --  
04:48:30 24 for willful infringement of the '605 and '681 patents  
04:48:33 25 because there is no legally sufficient basis on which the

04:48:38 1 factfinder could conclude that Defendant willfully  
04:48:41 2 infringed.

04:48:41 3 USAA has failed to establish that Wells Fargo knew  
04:48:45 4 of the '605 and '681 patents prior to the filing date of  
04:48:49 5 the suit.

04:48:50 6 USAA adduced no evidence at trial relating to  
04:48:53 7 alleged knowledge of the '605 and '68 -- '681 patent  
04:49:00 8 specifically.

04:49:01 9 USAA filed the asserted patents with  
04:49:04 10 non-publication requests and, thus, the claims of the  
04:49:07 11 asserted patents were not in the public domain or available  
04:49:10 12 to Wells Fargo until they issued. And there was no  
04:49:11 13 evidence adduced at trial that Wells Fargo was aware of the  
04:49:13 14 applications for the '605 and '681 patents prior to suit.

04:49:16 15 Nor was there evidence adduced that Wells Fargo  
04:49:19 16 was aware of the specifications of the parent patents or  
04:49:23 17 patent families, including the '227 or '200 patent prior to  
04:49:28 18 suit.

04:49:29 19 Additionally, judgment as a matter of law is  
04:49:32 20 warranted because USAA has failed to establish any  
04:49:34 21 egregious conduct that would support a finding of willful  
04:49:38 22 infringement, let alone conduct that is malicious,  
04:49:41 23 deliberate, in bad faith, or that of a pirate.

04:49:43 24 The only evidence of alleged willfulness consists  
04:49:47 25 of documents showing that Wells Fargo had access to

04:49:49 1 publicly available USAA -- publicly available USAA  
04:49:53 2 application. And some designers may have analyzed publicly  
04:49:58 3 available USAA materials, but the Federal Circuit has held  
04:50:01 4 that such evidence is not sufficient to establish knowledge  
04:50:03 5 for willfulness purposes.

04:50:05 6 Additionally, Wells Fargo contends that there is  
04:50:07 7 not evidence to support a finding that Wells Fargo copied  
04:50:12 8 any elements of USAA's products specifically related to the  
04:50:15 9 patented features -- features of the issued claims.

04:50:17 10 Additionally, even under an erroneous -- even  
04:50:25 11 under an -- excuse me, Your Honor. Even under an erroneous  
04:50:32 12 willfulness standard, the evidence is insufficient to show  
04:50:34 13 that Wells Fargo engaged in reckless behavior, was  
04:50:38 14 deliberately indifferent, or that it reasonably should have  
04:50:42 15 known it was infringing.

04:50:42 16 Additionally, there was no evidence adduced at  
04:50:43 17 trial to show that Wells Fargo was willfully blind.

04:50:46 18 Accordingly, Defendant moves for judgment as a  
04:50:48 19 matter of law on Plaintiff's claims for willful  
04:50:50 20 infringement of the '605 and '681 patents.

04:50:54 21 THE COURT: All right. Let me hear competing  
04:50:56 22 argument from Plaintiff on this issue.

04:50:58 23 MR. ROWLES: Thank you, Your Honor.

04:51:01 24 Plaintiff moves for judgment as a matter of law  
04:51:03 25 that no reasonable jury could find that Defendant has not

04:51:06 1 willfully infringed the asserted claims of the '681 and  
04:51:11 2 '605 patents.

04:51:12 3 In particular, the testimony of  
04:51:15 4 Ms. Lockwood-Stein, Mr. Hecht, and Mr. Ajami, as well as --  
04:51:18 5 as well as Plaintiff's Exhibits PX-8, 14, and 1182, have  
04:51:24 6 shown that Wells Fargo acted willfully when it infringed  
04:51:26 7 the asserted claims, including by examining USAA's system  
04:51:30 8 which USAA's employees testified practice claims of the  
04:51:35 9 asserted patents.

04:51:36 10 Reviewing USAA's marking page, being aware that  
04:51:40 11 USAA filed for patents in the MRDC space as early as 2010,  
04:51:45 12 choosing affirmatively not to investigate USAA's patents,  
04:51:48 13 leveraging design learnings from USAA when creating their  
04:51:52 14 own infringing system, and being aware, at least as of the  
04:51:56 15 filing of this complaint, of the '605 and '681 patents, no  
04:51:59 16 reasonable jury could conclude, based on the evidence  
04:52:02 17 adduced at trial, that Wells Fargo did not willfully  
04:52:05 18 infringe the patents-in-suit and at least one asserted  
04:52:11 19 claim.

04:52:12 20 Therefore, USAA respectfully requests that the  
04:52:13 21 Court enter judgment in its favor as a matter of law on the  
04:52:21 22 issue of willful infringement.

04:52:22 23 THE COURT: All right. Having heard the competing  
04:52:24 24 arguments from the parties, the Defendant's motion with  
04:52:24 25 regard to the issue of willfulness, seeking judgment as a

04:52:29 1 matter of law under Rule 50(a), is denied.

04:52:31 2 The Plaintiff's motion on the same subject,  
04:52:33 3 seeking a different result, as a -- based on a judgment as  
04:52:38 4 a matter of law under Rule 50(a) is also denied.

04:52:41 5 I'll next hear competing argument on the issue of  
04:52:44 6 anticipation, and I'll hear first from Plaintiff's counsel.

04:52:49 7 MR. ROWLES: Thank you, Your Honor.

04:52:51 8 On the issue of anticipation, Plaintiff moves for  
04:52:54 9 judgment as a matter of law that each of the asserted  
04:52:58 10 claims of the '681 patent and the '605 patent are not  
04:53:02 11 invalid on the ground of anticipation.

04:53:04 12 No reasonable jury could find, based on the  
04:53:07 13 evidence presented at trial, that Wells Fargo has proved by  
04:53:11 14 clear and convincing evidence that the claims -- the  
04:53:13 15 asserted claims of the '605 patent are anticipated by the  
04:53:18 16 '227 patent or that the claims of the '681 patent are  
04:53:21 17 anticipated by the '200 patent.

04:53:25 18 Anticipation requires the presence in a single  
04:53:27 19 prior art disclosure of all elements of a claimed invention  
04:53:30 20 arranged as in the claim. Conclusory expert testimony is  
04:53:33 21 insufficient to satisfy Defendant's burden to prove  
04:53:36 22 anticipation.

04:53:38 23 Wells Fargo's expert, Mr. Saffici, failed to  
04:53:40 24 engage with the claims and stated his opinions regarding  
04:53:44 25 anticipation in a conclusory manner without supporting

04:53:47 1 analysis. This type of general conclusory testimony does  
04:53:50 2 not suffice as a matter law as evidence of invalidity.

04:53:55 3 As such, there is legally insufficient evidence  
04:53:58 4 upon which a reasonable jury could find the asserted claims  
04:54:02 5 of the '605 and '681 patents anticipated, and judgment must  
04:54:08 6 be granted in USAA's favor.

04:54:10 7 THE COURT: All right. Let me hear argument from  
04:54:12 8 Defendant on this subject.

04:54:14 9 MR. MCCULLOUGH: Thank you, Your Honor. Matt  
04:54:15 10 McCullough for Wells Fargo.

04:54:16 11 Defendant moves for judgment as a matter of law on  
04:54:19 12 anticipation. No reasonable jury could find that the '227  
04:54:24 13 and '200 specifications provide sufficient written  
04:54:27 14 description to reasonably convey to a person skilled in the  
04:54:32 15 art that the inventors had possession of the claimed  
04:54:34 16 subject matter at the time of filing and, thus, supports  
04:54:36 17 the full scope of the asserted '605 and '681 patent claims,  
04:54:40 18 respectively.

04:54:41 19 For the '605 patent, Mr. Saffici testified that  
04:54:46 20 Claims 1, 3, and 11 broadly recite a portable device and  
04:54:49 21 digital camera without requiring any particular structural  
04:54:52 22 relationship between them. Thus, the device and camera  
04:54:55 23 could be separate or together.

04:54:56 24 Claims 12, 13, 14, and 22 of the '605 patent  
04:55:02 25 similarly recite a mobile device with a digital camera

04:55:07 1 without requiring any particular structural relationship.  
04:55:08 2 Thus, the mobile device and camera could be separate or  
04:55:11 3 together.

04:55:11 4 The '227 patent specification would be understood  
04:55:14 5 by a person of ordinary skill in the art as only disclosing  
04:55:17 6 separate computing devices in cameras. There is no  
04:55:20 7 disclosure of an integrated computing device with a camera.

04:55:24 8 None of USAA's cited evidence provides written  
04:55:27 9 description support sufficient to support the claimed  
04:55:30 10 priority date. The disclosure of PDAs is not linked to  
04:55:34 11 check deposit, nor does it describe having an integrated  
04:55:37 12 camera.

04:55:38 13 The phrase "laptop configuration" simply refers to  
04:55:41 14 a well-known form factor for a computer, but does not  
04:55:44 15 support the claims.

04:55:45 16 The file history does not include any substantive  
04:55:48 17 analysis of written description or comparison of the claims  
04:55:51 18 to the specification.

04:55:52 19 As such, there is no objective evidence that the  
04:55:55 20 Patent Office considered, or much less decided, the written  
04:55:58 21 description defense.

04:55:59 22 As to the remaining evidence, USAA has looked  
04:56:04 23 outside of the specification, but evidence outside the  
04:56:08 24 specification cannot support that the claims have proper  
04:56:10 25 written description support and are entitled to their

04:56:12 1 claimed priority date.

04:56:14 2 For the '681 patent, Mr. Saffici testified that  
04:56:18 3 Claims 12, 13, 14, 20, and 22 broadly recite a mobile  
04:56:23 4 device with a digital camera without requiring a particular  
04:56:27 5 structural relationship. Thus, the mobile device and  
04:56:29 6 digital camera can be separate or together.

04:56:31 7 Claim 30 broadly recites a mobile device and a  
04:56:36 8 digital camera without requiring a particular structural  
04:56:39 9 relationship. Thus, the mobile device and digital camera  
04:56:41 10 could be separate or together.

04:56:43 11 The '200 patent specification, similar to the '227  
04:56:47 12 specification, would be understood by a person of ordinary  
04:56:49 13 skill in the art as only disclosing separate computing  
04:56:53 14 devices and cameras. There's no disclosure of integrated  
04:56:57 15 computing devices.

04:56:58 16 USAA's cited evidence for the '681 patent is  
04:57:00 17 substantially the same as for the '605 patent, except that  
04:57:04 18 PDAs are not mentioned in the specification of the '681  
04:57:06 19 patent.

04:57:06 20 Based on this analysis, no reasonable jury could  
04:57:12 21 find that the asserted claims are entitled to claim  
04:57:14 22 priority to any date earlier than July 28th, 2017, which is  
04:57:18 23 the filing date of both the '605 and '681 patents. Under  
04:57:22 24 the 2017 priority date, the claims are anticipated and  
04:57:26 25 Defendant is entitled to judgment as a matter of law.

04:57:30 1 Mr. Saffici testified that every element of the  
04:57:33 2 '605 patent claims -- asserted claims are anticipated by  
04:57:36 3 the Oakes '227 reference.

04:57:36 4 Mr. Saffici also testified that every element of  
04:57:41 5 the '681 patent asserted claims are anticipated by the  
04:57:43 6 Oakes '200 reference.

04:57:44 7 USAA did not dispute this or accuse any contrary  
04:57:49 8 expert opinion. As such, the claims are anticipated.

04:57:51 9 Additionally, the claims are anticipated for a  
04:57:54 10 separate, independent reason. To the extent the jury finds  
04:57:58 11 infringement, Dr. Conte performed an element-by-element  
04:58:01 12 analysis of the accused product and stated that his  
04:58:04 13 analysis applied to every version of the Wells Fargo  
04:58:06 14 product dating back to July 2014 on Android and 2014 on  
04:58:11 15 iPhone.

04:58:11 16 Thus, if the jury finds infringement, it would  
04:58:14 17 have necessarily found that the Wells Fargo product, which  
04:58:17 18 would indisputably be prior art under the 2017 priority  
04:58:21 19 date, teaches each and every limitation of the asserted  
04:58:24 20 claims and, thus, would anticipate the claims.

04:58:27 21 THE COURT: Let me ask you this, Mr. McCullough:  
04:58:30 22 Given the argument that you've given me on anticipation,  
04:58:33 23 you've covered a fair amount of what would otherwise be  
04:58:36 24 part of the written description defense.

04:58:38 25 Do you have additional argument on written

04:58:40 1 description?

04:58:40 2 MR. MCCULLOUGH: I have, I think, two extra  
04:58:44 3 sentences.

04:58:45 4 THE COURT: Why don't you give them to me now.

04:58:48 5 MR. MCCULLOUGH: I will. Defendant moves for  
04:58:49 6 judgment as a matter of law for written description because  
04:58:52 7 the specification of the '605 patent is identical to the  
04:58:55 8 specification of the '227 patent.

04:58:58 9 The specification -- or the claims of the '605  
04:59:00 10 patent are also not supported by the '605 specification and  
04:59:04 11 would be invalid for failing written description.

04:59:07 12 And because the specification of the '681 patent  
04:59:09 13 is identical to the '200 patent to which it claims  
04:59:14 14 priority, the claims of the '681 patent are also not  
04:59:16 15 supported by the specification and, thus, would be invalid  
04:59:18 16 for failing the written description requirement.

04:59:21 17 THE COURT: All right. Thank you.

04:59:21 18 Mr. Rowles, do you have additional argument  
04:59:24 19 related specifically to the written description issue?

04:59:27 20 MR. ROWLES: I do, Your Honor.

04:59:28 21 THE COURT: Please give me that at this time.

04:59:30 22 MR. ROWLES: With respect to written description,  
04:59:32 23 Plaintiff submits that no reasonable jury could find, based  
04:59:36 24 on the evidence presented, that Wells Fargo has proved by  
04:59:38 25 clear and convincing evidence either that the asserted

04:59:43 1 claims lack adequate written description and are invalid  
04:59:46 2 under 35 U.S.C. Section 112 or are not entitled to claim  
04:59:52 3 priority back to the October 31st, 2006, priority date for  
04:59:55 4 which they claim, for two reasons.

04:59:57 5 First, the Federal Circuit has held that  
05:00:02 6 originally filed claims are part of the original patent  
05:00:04 7 disclosure for the purposes of written description. The  
05:00:07 8 original claims filed with the July 2017 patent application  
05:00:10 9 that resulted in the '681 patent, which are in evidence at  
05:00:13 10 Plaintiff's Exhibit 1265, beginning at Page 21, are  
05:00:17 11 virtually identical to the issued claims of the '681  
05:00:20 12 patent.

05:00:21 13 Similarly, the original claims filed with the July  
05:00:25 14 2017 patent application that resulted in the '605 patent  
05:00:27 15 which are in the record at Plaintiff's Exhibit 1266  
05:00:31 16 beginning at Page 23, are virtually identical to the issued  
05:00:35 17 claims of the '605 patent.

05:00:37 18 Wells Fargo has not introduced any evidence that  
05:00:40 19 the originally filed claims of the '605 or '681 patents  
05:00:43 20 failed to provide adequate written support for the claims  
05:00:46 21 that issued and has, thus, failed to satisfy its burden to  
05:00:49 22 prove invalidity under 35 U.S.C. Section 112.

05:00:53 23 Second, Wells Fargo's theory that the asserted  
05:00:57 24 claims lack written description support or -- cannot claim  
05:01:01 25 priority back to the 2006 filing date because one

05:01:04 1 particular species within the scope of the claims is not  
05:01:07 2 expressly recited in the specification cannot support a  
05:01:10 3 finding of invalidity as a matter of law.

05:01:12 4 Wells Fargo's only invalidity argument presented  
05:01:15 5 at trial is that the claims lack written description  
05:01:18 6 support because one particular species -- that is, a mobile  
05:01:21 7 or portable device with a physically integrated digital  
05:01:24 8 camera -- was not expressly recited in the specification.

05:01:28 9 It is settled law that a claim may be broader than  
05:01:30 10 the specific embodiment disclosed in a specification, and a  
05:01:35 11 patentee is not required to disclose every possible  
05:01:39 12 embodiment of the claims.

05:01:40 13 The Federal Circuit has held that a claim does not  
05:01:42 14 lack written description support when the difference  
05:01:44 15 between an undisclosed embodiment covered by the claims and  
05:01:47 16 an expressly disclosed embodiment in the specification is  
05:01:50 17 not critical or important to the invention.

05:01:52 18 Wells Fargo has not introduced evidence upon which  
05:01:56 19 a reasonable jury could find that this difference is  
05:01:58 20 critical or important in any way. Therefore, USAA requests  
05:02:03 21 that the Court enter judgment as a matter of law, both that  
05:02:07 22 Wells Fargo has not proved a lack of written description  
05:02:11 23 under 35 U.S.C. Section 112 and, as well, has not  
05:02:16 24 established that the claims are not entitled to claim  
05:02:18 25 priority back to the claimed priority date of October 31st,

05:02:23 1 2006.

05:02:24 2 THE COURT: All right. Well, with regard to  
05:02:26 3 Defendant's motions that the Court grant judgment as a  
05:02:29 4 matter of law under Rule 50(a) finding that it has not --  
05:02:38 5 excuse me, finding that the patents-in-suit are invalid  
05:02:41 6 based upon anticipation, and/or in the alternative are  
05:02:51 7 invalid based on a written description defense, those  
05:02:53 8 motions are denied.

05:02:54 9 With regard to Plaintiff's motions under  
05:02:56 10 Rule 50(a) that they are entitled to judgment as a matter  
05:02:58 11 of law that the patents-in-suit are not anticipated and  
05:03:00 12 valid for either anticipation or written description, those  
05:03:06 13 motions are similarly denied.

05:03:08 14 That leaves us with the issue of damages, counsel.  
05:03:11 15 Let me hear from Defendant on this first.

05:03:16 16 MR. UNDERWOOD: Thank you, Your Honor. Good  
05:03:22 17 afternoon. Travis Underwood for the Defendant.

05:03:25 18 THE COURT: Good afternoon, Mr. Underwood. Please  
05:03:27 19 proceed.

05:03:28 20 MR. UNDERWOOD: Judgment as a matter of law for  
05:03:30 21 Defendant is warranted on damages because no reasonable  
05:03:33 22 jury would have a legally sufficient evidentiary basis to  
05:03:37 23 award the damages sought by Plaintiff.

05:03:39 24 Section 284 of the Patent Act entitles a patentee  
05:03:44 25 to damages for infringement in an amount no less than a

05:03:48 1 reasonable royalty for the use made of the invention by the  
05:03:52 2 infringer.

05:03:53 3 Mr. Weinstein, the Plaintiff's damages expert,  
05:03:57 4 admitted that he had based his damages calculations on  
05:04:01 5 fraud prevention benefits that are not tethered to or  
05:04:05 6 recited in the claims.

05:04:07 7 Mr. Weinstein also erroneously attributed all of  
05:04:10 8 the cost savings of using mobile remote deposit capture  
05:04:16 9 over ATMs to the asserted patents without any  
05:04:19 10 explanation -- that is, there was no apportionment of the  
05:04:22 11 cost savings to the asserted patents.

05:04:23 12 The fact that the asserted patents in this case  
05:04:27 13 cannot be responsible for 100 percent of the value of  
05:04:31 14 mobile remote deposit capture is clear in light of the fact  
05:04:34 15 that Mr. Weinstein already attributed 40 percent of mobile  
05:04:40 16 remote deposit capture's value to a different set of  
05:04:42 17 patents. Thus, at least 40 percent of the value should be  
05:04:46 18 excluded in a proper apportionment analysis.

05:04:49 19 Mr. Weinstein cannot avoid apportionment just  
05:04:53 20 because he used the cost savings approach for a system  
05:04:56 21 claim.

05:04:57 22 The Supreme Court has made clear that  
05:05:00 23 patentholders who seek damages must in every case give  
05:05:04 24 evidence tending to separate or apportion the Defendant's  
05:05:08 25 profits and the patentee's damages between the patented

05:05:10 1 feature and the unpatented feature. It is not enough to  
05:05:13 2 compare the cost savings between using ATMs and mobile  
05:05:18 3 remote deposit capture.

05:05:18 4 Also, as an independent problem here, there are  
05:05:22 5 both -- they are both conventional -- excuse me,  
05:05:26 6 Your Honor. There are both conventional and non-patented  
05:05:29 7 features in mobile remote deposit capture.

05:05:32 8 Mr. Weinstein was required to specifically tie the  
05:05:35 9 cost savings to the incremental improvement of the asserted  
05:05:39 10 patents, not mobile remote deposit capture as a whole.

05:05:41 11 Mr. -- additionally, Mr. Weinstein's use of Wells  
05:05:45 12 Fargo's 1.2 billion in profit number from mobile remote  
05:05:50 13 deposit capture was a violation of the entire market value  
05:05:54 14 rule and was used only to skew the damages horizon.

05:05:58 15 And, finally, Mr. Weinstein's 86 percent versus 14  
05:06:01 16 percent split is plucked from thin air and is unsupported  
05:06:06 17 by the evidence.

05:06:06 18 And for those reasons, Your Honor, Defendant  
05:06:08 19 submits that it is entitled to judgment as a matter of law  
05:06:11 20 because there is no legally sufficient evidentiary basis to  
05:06:13 21 award damages sought by Plaintiff.

05:06:16 22 THE COURT: All right. Let me hear argument  
05:06:18 23 regarding this same issue from the Plaintiff, please.

05:06:22 24 MR. ROWLES: Thank you, Your Honor.

05:06:22 25 And if it is amenable to the Court, I can respond

05:06:28 1 to the motion by Defendant, and then Plaintiff's motion is  
05:06:31 2 on a topic that is not quite all square.

05:06:35 3 THE COURT: I'm happy to hear whatever arguments  
05:06:37 4 you think are necessary and appropriate.

05:06:40 5 MR. ROWLES: Understood, Your Honor.

05:06:41 6 THE COURT: As long as they're reasonably short.

05:06:43 7 MR. ROWLES: Well, first, Your Honor, we -- we  
05:06:45 8 oppose Defendant's motion. USAA has presented evidence  
05:06:48 9 upon which no reasonable jury could find damages in favor  
05:06:52 10 of USAA.

05:06:53 11 Mr. Weinstein testified about his analysis of  
05:06:55 12 various benefits obtained by Wells Fargo in connection with  
05:06:59 13 its use of the infringing MRDC system from August 2018  
05:07:03 14 through the date of trial.

05:07:04 15 These benefits include increased profits, cost  
05:07:07 16 savings, as well as benefits related to fraud prevention.

05:07:12 17 USAA also presented testimony from Defendant, as  
05:07:14 18 well as Defendant's own documents, showing various benefits  
05:07:17 19 associated with their use of the infringing product.

05:07:20 20 Mr. Weinstein supported his testimony with an  
05:07:24 21 apportionment analysis, and calculated the contributions  
05:07:28 22 specifically attributable to the patents-in-suit. This  
05:07:37 23 includes testimony that Wells Fargo saved considerable  
05:07:37 24 costs based on its customers' use of the infringing MRDC  
05:07:39 25 system, as opposed to other channels.

05:07:41 1 Mr. Weinstein also testified that at the  
05:07:43 2 hypothetical negotiation, the parties would consider a  
05:07:45 3 range of benefits associated with reducing fraud, as well  
05:07:48 4 as other points of input to that process, including  
05:07:51 5 benefits associated with MRDC generally.

05:07:53 6 Wells Fargo's experts both admitted that the  
05:07:57 7 asserted claims cover MRDC generally. The jury is entitled  
05:08:00 8 to weigh the evidence USAA has presented and, therefore,  
05:08:03 9 USAA submits that Wells Fargo's motion for judgment as a  
05:08:08 10 matter of law as to damages should be denied.

05:08:09 11 Additionally, Your Honor, there is a request from  
05:08:14 12 Defendant for a verdict form that asks the jury to return a  
05:08:17 13 verdict in an amount of a lump-sum damages figure.

05:08:20 14 Should that verdict -- verdict form be submitted  
05:08:23 15 to the jury, USAA submits that, based on the evidence  
05:08:27 16 adduced at trial, including Mr. Gerardi's admission that he  
05:08:29 17 did not consider any future profits or future benefits  
05:08:35 18 attributable to the patents and limited his damages  
05:08:38 19 analysis to the period from their issuance to the date of  
05:08:42 20 trial, there would be nothing upon which a reasonable jury  
05:08:45 21 could find for a lump-sum damages award that would -- to  
05:08:50 22 find that a lump-sum damages award would adequately  
05:08:53 23 compensate USAA for Wells Fargo's infringement in this  
05:08:55 24 case.

05:08:57 25 THE COURT: All right, counsel. Thank you.

05:09:00 1 Do you anything further on this, Mr. Underwood?

05:09:02 2 MR. UNDERWOOD: I do, Your Honor. Just a brief

05:09:04 3 response to the Plaintiff's motion on this issue.

05:09:06 4 As an initial matter, Your Honor, there is no

05:09:11 5 legal requirement that an expert consider damages after the

05:09:17 6 verdict in order to opine that a lump sum would be

05:09:21 7 appropriate.

05:09:21 8 Mr. Gerardi adequately supported his lump-sum

05:09:25 9 opinions, in particular, by noting that impartial reliance

05:09:31 10 on Dr. Villasenor, there were non-infringing alternatives

05:09:33 11 available. And as Mr. Weinstein actually agrees, that

05:09:36 12 would place a cap on the amount of damages. And he cited

05:09:40 13 to that evidence in support of his opinion that a lump sum

05:09:43 14 would be appropriate.

05:09:44 15 For that reason, Your Honor, we feel that his

05:09:46 16 theory should be submitted to the jury and that a verdict

05:09:48 17 finding a lump sum would be supported by the evidence.

05:09:52 18 THE COURT: All right. Well, thank you for your

05:09:55 19 competing argument, counsel.

05:09:56 20 With regard to the issue of damages, both as urged

05:09:59 21 by Plaintiff under Rule 50(a) and as urged by Defendant

05:10:03 22 under Rule 50(a), the Court denies both motions.

05:10:06 23 The Court will consider and has given considerable

05:10:12 24 thought to the best and most appropriate means of

05:10:17 25 submitting the damages question to the jury, and we'll

05:10:21 1 discuss the form of the verdict, as well as the form of the  
05:10:26 2 Court's intended final jury instruction, or charge, outside  
05:10:31 3 of this 50(a) hearing.

05:10:33 4                 But for the record and for completeness,  
05:10:38 5 Plaintiff's several motions seeking judgment as a matter of  
05:10:40 6 law under Rule 50(a), as well as Defendant's several  
05:10:44 7 motions seeking judgment as a matter of law under Rule  
05:10:48 8 50(a), are in their entirety denied by the Court.

05:10:52 9                 That completes the hearing before the Court on  
05:10:54 10 motions offered under Rule 50(a).

05:10:58 11                 Counsel, I have prepared for your review from the  
05:11:05 12 last submission that you jointly filed with the Court a  
05:11:08 13 next draft of what I believe the final jury instructions  
05:11:12 14 and the verdict form should look like. I'll have those in  
05:11:14 15 hard copy brought into the courtroom in a few minutes to be  
05:11:19 16 given to you.

05:11:20 17                 I'll afford each side an opportunity to review  
05:11:23 18 that. I don't think it's going to take a terribly long  
05:11:25 19 period of time because I know you're intimately familiar  
05:11:29 20 with the issues raised in those documents.

05:11:30 21                 But after I've given you a reasonable time to  
05:11:33 22 review that next draft from the Court, I'll meet with  
05:11:37 23 counsel in chambers, and we'll conduct at that time an  
05:11:42 24 informal charge conference where I invite input and comment  
05:11:47 25 freely and informally from any counsel who participated in

05:11:50 1 the trial or appeared in the case.

05:11:51 2 I don't see lead counsel here who I anticipate  
05:11:56 3 will be presenting closing arguments tomorrow. And as I  
05:11:59 4 indicated, they're not required to be present.

05:12:01 5 After I've had full input from the parties  
05:12:08 6 informally as a part of the informal charge conference,  
05:12:12 7 I'll take into account that input and any comments  
05:12:17 8 received, and I'll generate at that point what I believe  
05:12:19 9 the appropriate and legally sufficient final jury  
05:12:22 10 instruction and verdict form should be in this case.

05:12:25 11 I'll afford you an opportunity to review that, and  
05:12:27 12 then I'll conduct a formal charge conference on the record,  
05:12:31 13 at which time either party who believes that there's an  
05:12:34 14 issue that has survived that process and they need to  
05:12:36 15 formally object to, that objection can be made on the  
05:12:39 16 record and ruled on by the Court.

05:12:41 17 All right. With that, it is 12 minutes after  
05:12:45 18 5:00. The Court will stand in recess. I'll have those  
05:12:48 19 hard copies of the next draft of those documents brought in  
05:12:51 20 to you shortly. And then after I've given you some  
05:12:54 21 reasonable period of time, I'll send for you, and we'll  
05:12:57 22 meet in chambers and conduct an informal charge conference.

05:13:00 23 Ms. Glasser, I see you moved to the podium. Do  
05:13:04 24 you have something?

05:13:04 25 MS. GLASSER: I sure do. I was following

05:13:07 1 Mr. Hill. He probably has the same issue.

05:13:08 2 MR. HILL: We do, Your Honor.

05:13:09 3 MS. GLASSER: I don't think we received resolution  
05:13:09 4 from the Court on an issue the parties disagree about.

05:13:14 5 We're were hoping to report back to the folks at the  
05:13:17 6 office, which has to do with what types of slides the  
05:13:19 7 parties need to exchange tonight.

05:13:22 8 Plaintiff's proposal, as we mentioned earlier, is  
05:13:24 9 to do the same thing that Your Honor endorsed in Case  
05:13:27 10 No. 1, which was to eliminate any objections during the  
05:13:30 11 opening itself, or at least minimize the possibility of any  
05:13:33 12 objections, to have the parties actually disclose testimony  
05:13:39 13 slides, as well as, you know, sort of purely graphical  
05:13:42 14 slides so that there's not any people popping up with  
05:13:45 15 completeness objections or anything of that nature.

05:13:49 16 MR. HILL: And, Your Honor, our -- since --

05:13:51 17 THE COURT: What's your position, Mr. Hill?

05:13:53 18 MR. HILL: Your Honor, since we -- they get to go  
05:13:55 19 last, if they want to show us everything, we'll certainly  
05:13:59 20 look at it. So we'll accept that.

05:14:01 21 We would also ask that it be extended to exhibits,  
05:14:03 22 as well, to make sure documents aren't excerpted in a way  
05:14:07 23 that would be misleading.

05:14:08 24 MS. GLASSER: We don't have a disagreement.

05:14:10 25 MR. HILL: As long as it includes exhibits, too.

05:14:13 1 THE COURT: It should include exhibits.

05:14:15 2 MS. GLASSER: Absolutely. I'm sorry, I thought we

05:14:18 3 had a disagreement.

05:14:19 4 THE COURT: It should include any sections of the

05:14:22 5 transcribed testimony from the trial that you plan to show

05:14:22 6 during closing.

05:14:25 7 MR. HILL: Yes, sir, Your Honor.

05:14:25 8 MS. GLASSER: Yes, Your Honor. Thank you.

05:14:27 9 MR. HILL: The other thing, Your Honor, is the

05:14:28 10 Court's preference on timing for this. We had obviously --

05:14:30 11 because of the work that goes into it, like to make the

05:14:33 12 exchange as soon as possible between the parties of our

05:14:34 13 respective closing slides.

05:14:35 14 THE COURT: What do you suggest as to time?

05:14:39 15 MR. HILL: Your Honor, if we could exchange those

05:14:42 16 by 10:00 o'clock?

05:14:42 17 MS. GLASSER: That's too late for us. That

05:14:42 18 doesn't work for us at all.

05:14:44 19 MR. HILL: 9:00 o'clock?

05:14:46 20 MS. GLASSER: I think last time we did it at 6:30

05:14:47 21 or something like that, and I don't think we necessarily

05:14:50 22 need to do it that early, but we haven't -- Your Honor, as

05:14:51 23 you can tell, the parties haven't discussed this issue. I

05:14:54 24 suggest maybe we try to work it out and report back if we

05:14:57 25 can't. But 10:00 o'clock is way, way too late. We'll be

05:15:02 1 meeting and conferring until midnight on something like  
05:15:05 2 that.

05:15:05 3 MR. HILL: I'm looking at the time currently,  
05:15:08 4 Your Honor. It's 5:00 o'clock now. If --

05:15:09 5 THE COURT: Unless you can agree to something  
05:15:11 6 different, 8:00 o'clock.

05:15:12 7 MR. HILL: 8:00 o'clock? Okay.

05:15:13 8 MS. GLASSER: Thank you, Your Honor.

05:15:13 9 MR. HILL: And what time should we advise the  
05:15:15 10 Court of any disputes, Your Honor?

05:15:17 11 THE COURT: 10:00 o'clock.

05:15:18 12 MR. HILL: Standard time?

05:15:19 13 THE COURT: Standard time.

05:15:19 14 MR. HILL: Okay.

05:15:20 15 THE COURT: And you well understand that doesn't  
05:15:20 16 mean you stop trying to work them out.

05:15:22 17 MR. HILL: Understood. Is there anything  
05:15:24 18 different you would like with regard to these types of  
05:15:26 19 disputes, delivered for in the morning, other than just a  
05:15:29 20 binder at 7:00 o'clock --

05:15:29 21 THE COURT: I don't think so, Mr. Hill.

05:15:31 22 MR. HILL: All right. Very good. Thank you,  
05:15:34 23 Your Honor.

05:15:34 24 THE COURT: The fewer the better, and none at all  
05:15:36 25 would be optimal, but we will see.

05:15:39 1               Okay, counsel. All right. If you'll approach the  
05:16:01 2 courtroom deputy, I have two sets of both the charge and  
05:16:04 3 verdict form in its current version.

05:16:06 4               That's one set, Ms. Lockhart, and the one behind  
05:16:09 5 you is the other set. If you'll hand those to counsel.

05:16:13 6               MS. GLASSER: Thank you.

05:16:14 7               THE COURT: I'll give you 10 or 15 minutes to  
05:16:16 8 review these and then I'll meet with you in chambers for  
05:16:18 9 the informal charge conference.

05:16:18 10              MR. HILL: Your Honor, may I be excused for the  
05:16:20 11 remainder of the proceedings today?

05:16:22 12              THE COURT: Unless you're going to participate in  
05:16:24 13 those functions, you may.

05:16:26 14              MR. HILL: Thank you, Your Honor.

05:16:27 15              THE COURT: The Court stands in recess.

05:16:28 16              COURT SECURITY OFFICER: All rise.

05:16:29 17              (Recess.)

06:59:21 18              (Jury out.)

06:59:22 19              COURT SECURITY OFFICER: All rise.

06:59:27 20              THE COURT: Be seated, please.

06:59:58 21              All right. Counsel, as indicated previously,  
07:00:00 22 after the Court concluded motions asserted under  
07:00:03 23 Rule 50(a), the Court has conducted in chambers a robust  
07:00:08 24 and fulsome discussion with counsel for the parties as an  
07:00:12 25 informal charge conference in which both sides have had an

07:00:16 1 ample opportunity to offer any input or suggestion or  
07:00:20 2 comment they might have as to the final jury instructions  
07:00:24 3 and verdict form.

07:00:24 4                 The Court had the opportunity to consider that  
07:00:29 5 input from the parties after the conclusion of the informal  
07:00:33 6 charge conference. Considering the same, reviewing the  
07:00:37 7 previous work already done, the Court has now generated a  
07:00:41 8 current version of the final jury instructions and verdict  
07:00:44 9 form, which it believes is accurate and appropriate.

07:00:50 10                 That copy has been given to counsel for both of  
07:00:53 11 the parties with an opportunity to review it and to see any  
07:00:57 12 areas where the documents have varied from what they were  
07:01:01 13 at the time we held the informal charge conference.

07:01:03 14                 Having done that, the Court now will conduct a  
07:01:07 15 formal charge conference on the record where either party  
07:01:12 16 may, if it feels compelled in the interest of its client,  
07:01:16 17 offer such formal objections to both the final jury  
07:01:20 18 instructions and verdict form as they believe are  
07:01:22 19 appropriate and necessary.

07:01:23 20                 As is the Court's practice, I'll ask one  
07:01:30 21 spokesperson from each party to go to the podium. I'll  
07:01:34 22 begin with the final jury instruction and review that  
07:01:38 23 document on a page-by-page basis.

07:01:42 24                 At any point in that process where we get to a  
07:01:44 25 page that you believe something has been included that's

07:01:48 1 improper and you feel compelled to object, you may do so.  
07:01:53 2 At any point that you feel something has been omitted,  
07:01:56 3 which is necessary and you feel you should object, that's  
07:01:59 4 also appropriate.

07:02:01 5 If at any point as we go through the document on a  
07:02:04 6 page-by-page basis you believe an objection is appropriate,  
07:02:08 7 I'll be glad to stop and hear your objection and then rule  
07:02:11 8 on the same. Once we've completed that page-by-page review  
07:02:15 9 of the final jury instructions, we'll do the same for the  
07:02:19 10 verdict form.

07:02:19 11 So at this time, whoever is going to speak for  
07:02:21 12 Plaintiff, please go to the podium. Whoever is going to  
07:02:24 13 speak for Defendant, please go to the podium, as well.

07:02:29 14 It looks like Mr. Rowles and Mr. McCullough; is  
07:02:33 15 that correct?

07:02:33 16 MR. ROWLES: I think I'm the only one left, Your  
07:02:36 17 Honor.

07:02:36 18 MR. MCCULLOUGH: Yes, Your Honor.

07:02:37 19 THE COURT: Let's begin with the final jury  
07:02:40 20 instructions. I'll start with the cover page or Page 1.

07:02:42 21 Is there any objection to anything on this page  
07:02:45 22 from either Plaintiff or Defendant?

07:02:47 23 MR. ROWLES: Nothing from Plaintiff, Your Honor.

07:02:48 24 MR. MCCULLOUGH: Nothing from Defendant, Your  
07:02:50 25 Honor.

07:02:50 1 THE COURT: Turning then to Page 2, is there  
07:02:52 2 objection here from either party?

07:02:54 3 MR. ROWLES: Nothing from Plaintiff, Your Honor.

07:02:56 4 MR. MCCULLOUGH: Nothing from Defendant.

07:02:57 5 THE COURT: Page 3, is there any objection from  
07:03:01 6 either party?

07:03:01 7 MR. ROWLES: Nothing from Plaintiff.

07:03:02 8 MR. MCCULLOUGH: No objection, Your Honor.

07:03:03 9 THE COURT: Turning to Page 4, is there objection  
07:03:07 10 here from either party?

07:03:09 11 MR. ROWLES: Nothing from Plaintiff.

07:03:10 12 MR. MCCULLOUGH: No objection, Your Honor.

07:03:12 13 THE COURT: Page 5, is there objection from either  
07:03:14 14 party?

07:03:14 15 MR. ROWLES: Nothing from Plaintiff.

07:03:19 16 MR. MCCULLOUGH: Nothing from Defendant.

07:03:20 17 THE COURT: Page 6, is there objection from either  
07:03:22 18 party?

07:03:22 19 MR. ROWLES: Nothing from Plaintiff.

07:03:24 20 MR. MCCULLOUGH: Nothing from Defendant.

07:03:25 21 THE COURT: Page 7, is there objection from either  
07:03:27 22 party?

07:03:28 23 MR. ROWLES: Nothing from Plaintiff.

07:03:29 24 MR. MCCULLOUGH: Nothing from Defendant.

07:03:31 25 THE COURT: Page 8, is there objection from either

07:03:34 1 party?

07:03:34 2 MR. ROWLES: Nothing from Plaintiff.

07:03:37 3 MR. MCCULLOUGH: Nothing from Defendant.

07:03:38 4 THE COURT: Turning then to Page 9 of the final

07:03:42 5 jury instructions, is there objection here from either

07:03:46 6 party?

07:03:47 7 MR. ROWLES: Nothing from Plaintiff.

07:03:48 8 MR. MCCULLOUGH: Nothing from Defendant.

07:03:50 9 THE COURT: Turning then to Page 10, is there

07:03:53 10 objection from either party?

07:03:54 11 MR. ROWLES: Nothing from Plaintiff.

07:03:56 12 MR. MCCULLOUGH: Nothing from Defendant.

07:03:57 13 THE COURT: Page 11, is there any objection?

07:03:59 14 MR. ROWLES: Nothing from Plaintiff.

07:04:00 15 MR. MCCULLOUGH: Nothing from Defendant.

07:04:02 16 THE COURT: Page 12, is there any objection?

07:04:04 17 MR. ROWLES: There is from Plaintiff, Your Honor.

07:04:06 18 THE COURT: State your objection.

07:04:07 19 MR. ROWLES: The -- the last sentence on Page 12,

07:04:10 20 beginning, "a party obtains a benefit from a system," and

07:04:14 21 continuing onto Page 13, Plaintiff objects to this

07:04:18 22 instruction on the basis that it's inconsistent with the

07:04:22 23 controlling Centillion decision, which has held that a

07:04:26 24 system claim can be infringed by use of a system even if

07:04:31 25 the system is used and collectively engages every element

07:04:34 1 of the system.

07:04:35 2 We believe it's misleading and prejudicial to  
07:04:37 3 instruct the jury specifically and suggest that an  
07:04:41 4 element-by-element analysis identifying a particular  
07:04:44 5 benefit for each claim element is required. We'd object on  
07:04:48 6 that basis.

07:04:49 7 And there's a second objection to this page,  
07:04:54 8 moving on to Claim 13, which is based on --

07:04:57 9 THE COURT: You mean Page 13?

07:05:00 10 MR. ROWLES: Yes, Your Honor.

07:05:02 11 The -- the section that begins on Page 12 and  
07:05:05 12 continues to Page 13, Plaintiff believes that there should  
07:05:09 13 be an instruction to the jury regarding the principles of  
07:05:12 14 vicarious liability.

07:05:14 15 Based on the Centillion decision, which held that  
07:05:17 16 a -- the principles of vicarious liability that existed at  
07:05:21 17 that time were applicable to system claims, and the Federal  
07:05:25 18 Circuit's subsequent expansion of the vicarious liability  
07:05:28 19 doctrine in the remanded Akamai decision, we believe it  
07:05:31 20 would be appropriate to instruct the jury, as well, that a  
07:05:34 21 party can be held vicariously liable for the actions of  
07:05:38 22 another if they meet the direction and control standard as  
07:05:43 23 expressed in Akamai, even for system claims.

07:05:46 24 THE COURT: All right. Those objections are  
07:05:47 25 overruled.

07:05:47 1 Are there objections on Page 12 to anything from  
07:05:50 2 the Defendant?

07:05:52 3 MR. MCCULLOUGH: Nothing from Defendant.

07:05:53 4 THE COURT: Anything from Defendant on Page 13?

07:05:56 5 MR. MCCULLOUGH: Yes, Your Honor.

07:05:58 6 Defendant objects to the willfulness instruction  
07:06:01 7 on the basis, first, that there's insufficient evidence to  
07:06:05 8 submit willfulness to the jury, as explained in our 50(a)  
07:06:08 9 motion.

07:06:09 10 Additionally, we object to the sentence in the  
07:06:12 11 middle of the last full paragraph beginning "a Defendant is  
07:06:15 12 indifferent to the rights of another." We believe that  
07:06:18 13 that's a misstatement of the law. The correct standard for  
07:06:23 14 willful blindness is stated on the next page, and so we  
07:06:26 15 would request that that sentence be struck.

07:06:28 16 THE COURT: All right. That objection is  
07:06:31 17 overruled.

07:06:32 18 Mr. Rowles, do you have any -- any other objection  
07:06:36 19 on Page 13?

07:06:36 20 MR. ROWLES: No, Your Honor.

07:06:37 21 THE COURT: Then we'll turn to Page 14, and I'll  
07:06:41 22 ask if either party has any objection to anything here?

07:06:44 23 MR. ROWLES: Nothing from Plaintiffs, Your Honor.

07:06:46 24 MR. MCCULLOUGH: Yes, Your Honor.

07:06:47 25 Defendants object in the first full paragraph, the

07:06:50 1 first sentence, knowledge of the existence of a patent or  
07:06:52 2 patent family can be relevant to willful infringement.

07:06:55 3 We object on the basis, we believe the law is that  
07:06:59 4 knowledge of a patent is required in order to show willful  
07:07:02 5 infringement. And we do not believe knowledge of a patent  
07:07:05 6 family is relevant in any way.

07:07:07 7 Additionally, we object to the next sentence which  
07:07:12 8 states, the standard for willful blindness, and we believe  
07:07:16 9 there's no basis to submit willful blindness to the jury.

07:07:19 10 THE COURT: All right. That's overruled.

07:07:20 11 Anything else from either party on Page 14?

07:07:23 12 MR. ROWLES: Not from Plaintiff, Your Honor.

07:07:25 13 MR. MCCULLOUGH: Nothing else from Defendant.

07:07:26 14 THE COURT: Turning then to Page 15, is there any  
07:07:29 15 objection from either party here?

07:07:30 16 MR. ROWLES: No objection from Plaintiff,  
07:07:32 17 Your Honor.

07:07:32 18 MR. MCCULLOUGH: Your Honor, there was just one  
07:07:34 19 thing we noticed. We forgot to raise this in chambers.  
07:07:37 20 The last -- the last full paragraph, the first sentence  
07:07:41 21 reads a little awkwardly.

07:07:42 22 I think the sentence is maybe supposed to end  
07:07:45 23 after PTO and end after the process of obtaining a patent.  
07:07:49 24 But it doesn't seem to read correctly to us.

07:07:53 25 THE COURT: All right. Counsel, let me make sure

07:07:59 1 I'm at the same place where you are.

07:08:02 2 This is the last full paragraph on Page 15?

07:08:06 3 MR. MCCULLOUGH: Yes, Your Honor.

07:08:18 4 MR. ROWLES: If I may, Your Honor, it looks like  
07:08:20 5 maybe something along the lines of the process of obtaining  
07:08:24 6 a patent is omitted here. The process of obtaining a  
07:08:28 7 patent is called patent prosecution.

07:08:40 8 THE COURT: All right. Counsel, I think there's  
07:08:42 9 merit to this -- I don't know if it's an objection, but at  
07:08:46 10 least to this issue.

07:08:47 11 And my intention is to change the last full  
07:08:53 12 paragraph at the bottom of Page 15 to read as follows: As  
07:08:58 13 previously explained, comma, to obtain a patent, comma, one  
07:09:03 14 must first file an application with the United States  
07:09:05 15 Patent and Trademark Office, period. The process of  
07:09:09 16 obtaining a patent is called patent prosecution, period.

07:09:13 17 That would be two sentences to replace the  
07:09:16 18 existing one sentence that's there now.

07:09:18 19 Is there any objection to that change?

07:09:20 20 MR. ROWLES: None from Plaintiff.

07:09:21 21 MR. MCCULLOUGH: No objection, Your Honor.

07:09:22 22 THE COURT: All right. Anything else from either  
07:09:25 23 party on Page 15?

07:09:26 24 MR. ROWLES: No, Your Honor.

07:09:27 25 MR. MCCULLOUGH: Nothing else from the Defendant.

07:09:28 1 THE COURT: All right. Then moving to Page 16 of  
07:09:32 2 the final jury instructions, is there objection here from  
07:09:35 3 either party?

07:09:36 4 MR. ROWLES: No objection from Plaintiff.

07:09:37 5 MR. MCCULLOUGH: Yes, Your Honor.

07:09:38 6 Defendant objects in the second full paragraph to  
07:09:41 7 the last two sentences. We don't believe any information  
07:09:45 8 about when the applications were published is relevant to  
07:09:47 9 any issue in this case.

07:09:59 10 THE COURT: All right. That's overruled.

07:10:00 11 Anything else on Page 16 from Defendant?

07:10:02 12 MR. MCCULLOUGH: Nothing else.

07:10:04 13 THE COURT: Moving then to Page 17, is there any  
07:10:07 14 objection here from either party?

07:10:09 15 MR. ROWLES: There is from Plaintiff, Your Honor.

07:10:11 16 The sentence beginning: However, the  
07:10:13 17 specification must describe, Plaintiff objects to the  
07:10:16 18 inclusion of this sentence as misleading and prejudicial,  
07:10:20 19 particularly in view of statements that have been made  
07:10:23 20 throughout the trial by Defendant and Defendant's witnesses  
07:10:26 21 suggesting that if a claim covers two particular  
07:10:31 22 embodiments, that both particular embodiments must be  
07:10:34 23 disclosed, and the inclusion of this sentence suggests to  
07:10:38 24 the jury that this is a different situation than it is.

07:10:42 25 We were not in a traditional genus/species

07:10:47 1 situation. The defense theory is -- has identified only an  
07:10:50 2 arbitrary distinction between devices where a computer  
07:10:53 3 connected to a camera inside one physical box or -- or  
07:10:57 4 similar devices with two physical boxes is not different in  
07:11:02 5 any material way to the invention in suggesting that --  
07:11:05 6 with this language I think would mislead the jury. And so  
07:11:09 7 we object on that basis.

07:11:10 8 THE COURT: All right. That objection by  
07:11:11 9 Plaintiff is overruled.

07:11:13 10 Anything else by either party on Page 17?

07:11:18 11 MR. MCCULLOUGH: Yes, Your Honor.

07:11:19 12 Defendant objects to the sentence before that.

07:11:21 13 Although the following sentence does add a little bit of  
07:11:24 14 context, we believe the statement that -- as one example  
07:11:27 15 can support written description. There's not enough  
07:11:30 16 context, and there's an insufficient statement of the full  
07:11:34 17 law relating to when a single example could potentially  
07:11:38 18 provide written description support, so we think it's  
07:11:41 19 prejudicial and should be excluded.

07:11:43 20 THE COURT: All right. Thank you, Mr. McCullough.  
07:11:44 21 That objection is overruled.

07:11:45 22 Anything further, counsel, from either of you on  
07:11:48 23 Page 17?

07:11:49 24 MR. ROWLES: Nothing from Plaintiff, Your Honor.  
07:11:51 25 MR. MCCULLOUGH: Nothing from Defendant.

07:11:52 1 THE COURT: Turning next to Page 18, is there  
07:11:55 2 objection here from either party?

07:11:57 3 MR. ROWLES: No objection from Plaintiff.

07:11:58 4 MR. MCCULLOUGH: Nothing from Defendant.

07:12:00 5 THE COURT: Turning then to Page 19, is there any  
07:12:02 6 objection here from either party?

07:12:04 7 MR. ROWLES: No objection from Plaintiff.

07:12:05 8 MR. MCCULLOUGH: Nothing from Defendant.

07:12:07 9 THE COURT: All right. Next Page 20, any  
07:12:11 10 objection here?

07:12:11 11 MR. ROWLES: No objection, Your Honor.

07:12:13 12 MR. MCCULLOUGH: Nothing from Defendant.

07:12:14 13 THE COURT: Page 21, any objection?

07:12:17 14 MR. ROWLES: No, Your Honor.

07:12:18 15 MR. MCCULLOUGH: No objection.

07:12:19 16 THE COURT: I'll note, counsel, that beginning on  
07:12:24 17 Page 21 and continuing on to Page 22, all 15 of the  
07:12:28 18 Georgia-Pacific factors are set forth.

07:12:30 19 It's my understanding from our discussion in  
07:12:32 20 chambers that both sides agree that the Court should  
07:12:35 21 properly charge the jury on all 15 of those factors; is  
07:12:39 22 that correct?

07:12:39 23 MR. ROWLES: That's our understanding, Your Honor.

07:12:42 24 MR. MCCULLOUGH: Yes, Your Honor.

07:12:43 25 THE COURT: All right. Any objection to anything

07:12:47 1 on Page 22?

07:12:49 2 MR. ROWLES: No, Your Honor.

07:12:51 3 MR. MCCULLOUGH: No objection, Your Honor.

07:12:52 4 THE COURT: Turning then to Page 23, is there an  
07:12:55 5 objection from either party here?

07:12:56 6 MR. ROWLES: No objection, Your Honor.

07:12:58 7 MR. MCCULLOUGH: No objection.

07:12:59 8 THE COURT: Page 24, any objection from either  
07:13:03 9 party?

07:13:03 10 MR. ROWLES: No objection, Your Honor.

07:13:05 11 MR. MCCULLOUGH: No objection, Your Honor.

07:13:07 12 THE COURT: And the last page, Page 25, is there  
07:13:10 13 any objection here?

07:13:11 14 MR. ROWLES: No objection, Your Honor.

07:13:13 15 MR. MCCULLOUGH: No objection, Your Honor.

07:13:14 16 THE COURT: All right. Turning to the verdict  
07:13:16 17 form.

07:13:19 18 MR. MCCULLOUGH: Your Honor, with the Court's  
07:13:20 19 permission, may I turn it over to Mr. Underwood?

07:13:23 20 THE COURT: You may.

07:13:24 21 MR. MCCULLOUGH: Thank you.

07:13:25 22 THE COURT: Mr. Underwood, you're going to  
07:13:30 23 represent the Defendant with regard to the formal charge  
07:13:32 24 conference related to the verdict form?

07:13:34 25 MR. UNDERWOOD: With the Court's permission, Your

07:13:36 1 Honor.

07:13:36 2 THE COURT: Permission is granted.

07:13:38 3 Let's begin, we'll follow the same format,

07:13:41 4 counsel. The cover letter -- or, excuse me, the cover page

07:13:44 5 of the verdict form, which is not otherwise numbered, but

07:13:47 6 Page 1 is first, and I'll ask if either side has any

07:13:51 7 objection to anything either contained within or omitted

07:13:54 8 from the first page of the verdict form?

07:13:56 9 MR. ROWLES: No objection from Plaintiff, Your

07:13:56 10 Honor.

07:13:59 11 MR. UNDERWOOD: None from Defendant.

07:14:01 12 THE COURT: Next is Page 2, is there objection

07:14:02 13 here from either party?

07:14:03 14 MR. ROWLES: No, Your Honor.

07:14:05 15 MR. UNDERWOOD: None from Defendant.

07:14:07 16 THE COURT: Page 3, including instructions to the

07:14:09 17 jury, is there any objection from either party?

07:14:11 18 MR. ROWLES: There's no objection, Your Honor, but

07:14:13 19 it looks like the word "complies" is missing an "i".

07:14:18 20 THE COURT: Say that again, Mr. Rowles.

07:14:20 21 MR. ROWLES: The word "complies" in the bottom

07:14:22 22 sentence, it's just a typo, I think, but there's an "i"

07:14:26 23 missing.

07:14:27 24 THE COURT: Oh, I'll correct that to properly

07:14:29 25 spell the word "complies."

07:14:31 1 Any problem with that, Mr. Underwood?

07:14:33 2 MR. UNDERWOOD: No, Your Honor.

07:14:34 3 THE COURT: All right. Unless there's something

07:14:37 4 else from either party, we'll move from Page 3 to Page 4 of

07:14:41 5 the verdict form where Question No. 1 is located. Is there

07:14:44 6 objection here from either party?

07:14:46 7 MR. ROWLES: None from Plaintiff.

07:14:47 8 MR. UNDERWOOD: Yes, Your Honor.

07:14:49 9 Defendant does have an objection to the submission

07:14:53 10 of Question 1 in its current state, its -- its broad forum

07:15:00 11 state. Defendant would submit that it would be more

07:15:03 12 appropriately submitted to the jury with a breakdown -- a

07:15:07 13 granular breakdown as to each of the asserted claims such

07:15:10 14 that the jury would answer yes or no with respect to each

07:15:13 15 of the asserted claims.

07:15:14 16 THE COURT: Understood. That objection is

07:15:16 17 overruled.

07:15:17 18 Turning then to Page 5 of the verdict form where

07:15:22 19 Question 2 is located. Is there objection here from either

07:15:25 20 party?

07:15:26 21 MR. ROWLES: No objection from Plaintiff, Your

07:15:28 22 Honor.

07:15:28 23 MR. UNDERWOOD: None from Defendant.

07:15:29 24 THE COURT: Turning next to Page 6 of the verdict

07:15:34 25 form where Question 3 is located, is there any objection

07:15:38 1 here from either party?

07:15:39 2 MR. ROWLES: No objection from Plaintiff, Your  
07:15:41 3 Honor.

07:15:41 4 MR. UNDERWOOD: Yes, Your Honor.

07:15:42 5 Defendant would object to Question No. 3 on the  
07:15:46 6 same grounds as previously stated with respect to Question  
07:15:49 7 No. 1.

07:15:53 8 THE COURT: All right. That objection is  
07:15:56 9 overruled.

07:15:56 10 Turning next to Page 7 of the verdict form where  
07:16:01 11 Question 4 is located. Is there any objection here?

07:16:03 12 MR. ROWLES: No objection from Plaintiff, Your  
07:16:06 13 Honor.

07:16:06 14 MR. UNDERWOOD: Yes, Your Honor.

07:16:08 15 Defendant objects to the submission of Question  
07:16:12 16 No. 4 with the language "and through the date of trial."  
07:16:19 17 Defendant would submit that that language should not be  
07:16:21 18 included because it is suggestive of the form of the  
07:16:25 19 royalty and suggestive of the -- of perhaps a running  
07:16:28 20 royalty, whereas the evidence has been adduced to support a  
07:16:32 21 lump-sum royalty. And on that ground, Defendant would  
07:16:35 22 object to this question.

07:16:41 23 THE COURT: All right. That objection is  
07:16:42 24 overruled.

07:16:43 25 Page 8 is the final page of the verdict form. Is

07:16:47 1 there any objection here from either party?

07:16:50 2 MR. ROWLES: None from Plaintiff, Your Honor.

07:16:51 3 MR. UNDERWOOD: None from Defendant.

07:16:53 4 THE COURT: All right. Counsel, that completes

07:16:55 5 the formal charge conference.

07:16:58 6 It's my intention to reproduce both of these

07:17:02 7 documents with only the adjustments that have been set

07:17:06 8 forth in the record as a part of this formal charge

07:17:08 9 conference.

07:17:09 10 My intention, as earlier stated, is to produce

07:17:12 11 eight separately-printed copies of the final jury

07:17:16 12 instructions and one clean copy of the verdict form and to

07:17:21 13 have those ready to send back to the jury after they've

07:17:25 14 heard closing arguments and my final instructions at the

07:17:29 15 time I direct them to begin their deliberations.

07:17:31 16 Is either Plaintiff or Defendant aware of anything

07:17:38 17 further that needs to be taken up before we recess in the

07:17:42 18 morning -- recess until the morning with the understanding

07:17:44 19 that the Court intends to begin with its final jury

07:17:48 20 instructions and proceed to closing arguments at that time?

07:17:51 21 MR. ROWLES: Nothing from Plaintiff, Your Honor.

07:17:53 22 MR. UNDERWOOD: Nothing from Defendant.

07:17:54 23 THE COURT: All right. Thank you, gentlemen.

07:17:56 24 That should be it for the day. And we stand in

07:18:01 25 recess until tomorrow morning.

07:18:03 1 COURT SECURITY OFFICER: All rise.

07:18:05 2 (Recess.)

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4

5 CERTIFICATION

6

7 I HEREBY CERTIFY that the foregoing is a true and  
8 correct transcript from the stenographic notes of the  
9 proceedings in the above-entitled matter to the best of my  
10 ability.

11

12

13 /S/ Shelly Holmes \_\_\_\_\_  
14 SHELLY HOLMES, CSR, TCRR  
OFFICIAL REPORTER  
State of Texas No.: 7804  
15 Expiration Date: 12/31/20

1/9/2020  
Date

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